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HEARING

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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Thursday,
March 19, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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ORIGINAL

APPEARANCES:On Behalf of Broadcast Music, Inc.:

JOHN FELLAS, ESQ.
NORMAN C. KLEINBERG, ESQ.
MICHAEL E. SALZMAN, ESQ.
of: Hughes, Hubbard & Reed, LLP
One Battery Park Plaza
New York, New York 10004-1482
(212) 837-6075 (JF)
6680 (NCK)
6833 (MES)
and

JOSEPH J. DiMONA, ESQ. (Asst. V.P.)
MARVIN L. BERENSON, ESQ.
Legal and Regulatory Affairs
BMI
320 West 57th Street
New York, New York 10019-3790
(212) 830-3847

On Behalf of ASCAP:

I. FRED KOENIGSBERG, ESQ.
PHILIP H. SCHAEFFER, ESQ.
J. CHRISTOPHER SHORE, ESQ.
SAMUEL MOSENKIS, ESQ.
of: White & Case, LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8740 (PHS)
8394 (JCS)

BEVERLY A. WILLETT, ESQ.
ASCAP Building
Sixth Floor
One Lincoln Plaza
New York, New York 10023
(212) 621-6289

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APPEARANCES (continued):On Behalf of the Public Broadcasters:

R. BRUCE RICH, ESQ.
JONATHAN T. WEISS, ESQ.
MARK J. STEIN, ESQ.
TRACEY I. BATT, ESQ.
ELIZABETH FORMINARD, ESQ.
of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153-0119
(212) 310-8170 (RBR)
8885 (JTW)
8969 (MJS)
8405 (TIB)

and

KATHLEEN COX, ESQ. (General Counsel)
ROBERT M. WINTERINGHAM, ESQ. (Staff Atty)
Corporation for Public Broadcasting
901 E Street, N.W.
Washington, D.C. 20004-2037
(202) 879-9701 (KC)
9707 (RMW)

and

On Behalf of the Public Broadcasters:

GREGORY FERENBACH, ESQ.,
(Vice Pres. & Acting General Counsel)
ANN W. ZEDD, ESQ. (Asst. Gen. Counsel)
KAREN C. RINDNER, ESQ. (Asst. Gen.
Counsel)
PBS
1320 Braddock Place
Alexandria, Virginia 22314
(703) 739-5063 (GF)
5170 (AWZ)

and

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APPEARANCES (continued):

On Behalf of the Public Broadcasters:

NEAL A. JACKSON, ESQ.
DENISE B. LEARY, ESQ.
GREGORY A. LEWIS, ESQ.
Deputy General Counsel
National Public Radio
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 414-2000 (NPR)
2049 (DBL)

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1 BY MR. SHORE:

2 Q Dr. Boyle, would you please explain how
3 you went about gathering data for the music use
4 comparison that is part of your formula?

5 A Well, I suppose the shortest answer is
6 that we already had that data essentially in our
7 records, because we have an existing survey and
8 distribution system that we use to pay our members.
9 But I really ought to take a step back from that, I
10 suppose, and give you a little background on the
11 survey system and talk about the distribution -- the
12 weighting aspects of it as well.

13 Q You need more room.

14 A I need a better eraser.

15 A lot of the issues we face all the time
16 for having collected the money from our customers is
17 to pay it out to our members, to the writers and
18 publishers who have had performances on the various
19 media. And so there are two steps in that process.
20 One is to identify what music is performed and how
21 it's performed, and the second step is to attach
22 values to those performances so that we can pay our

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1 members.

2 We have independent survey experts that
3 work with us to make sure that we identify
4 performances in a representative manner, so that all
5 our members' works have an opportunity of coming into
6 our survey. Actually, that is -- have we talked at
7 all in this proceeding about some of the background --
8 about the consent decree and the --

9 Q A little bit.

10 A -- workings of the Department of Justice?
11 We've got a consent decree that governs our
12 operations. It goes back to the 1940s. And, in
13 particular, there is an 1960 order in that decree that
14 sets out a lot of detail about how we can weight
15 performances, the values we can attach to performances
16 to pay our members, and also some general provisions
17 about the various surveys of performances.

18 It states that we have to base our
19 distributions primarily upon an objective survey of
20 performances, and, in fact, the 1960 order talks about
21 how there have to be representative samples, how they
22 have to be designed by independent survey experts, and

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1 the like.

2 So the problem we face all the time,
3 really, is the situation where we have millions and
4 millions of performances over the course of the year
5 throughout the United States using various different
6 media -- public television by the public television
7 stations, and on the commercial networks and network
8 television, by local television stations, by public
9 radio stations, by the commercial radio stations, and
10 by all our various other customers -- airlines, Muzak,
11 the cable industry, all of the various licenses.

12 In some cases, the economics are such that
13 we can do a complete count of performances, between
14 the money we collect from our customers and what it
15 would cost to identify those performances. In network
16 TV for years and years and years, for example, we have
17 done a complete count of the performances on the ABC,
18 CBS, and NBC television networks.

19 In other cases, like public radio, where
20 you have 10,000 or more stations performing music
21 every day throughout the year, it will simply be
22 prohibitive in terms of the cost to do a complete

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1 count of performances.

2 We would spend more of our members' money
3 than we collect from the radio stations to identify
4 what is performed. There we have to rely on the
5 sample survey -- statistically-designed representative
6 sample by our independent survey experts.

7 Just in terms of an overview, to take all
8 of this performance information -- whether it's on a
9 complete count basis or whether it's on a sample basis
10 -- and we put that separately through our distribution
11 system, which assigns weights and values to those
12 performances. Those are going to generate, in our
13 terms, credits. That's the unit of measurement -- the
14 next-to-the-last unit of measurement we use in terms
15 of paying our members.

16 Credits are our benchmark, our measurement
17 that contains all of the various weights that we apply
18 to different types of performances on different
19 stations in different media. The last step ultimately
20 is to multiply those credits by a credit value to
21 convert it into dollars -- that's what we have -- so
22 that we can send our members checks every quarter.

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1 So in terms of the process just generally,
2 once we've gotten those -- we've identified the
3 performances, we've put them through our distribution
4 system, the five weights, we have generated credits.
5 We then determine which of our members we are going to
6 pay on each of those credits. We send our members
7 summary statements every quarter indicating how many
8 credits they have for their performances, how much
9 money that is worth.

10 For these purposes, we went back to that
11 historical data and found that we had to make some
12 adjustments to the credits. But it's the underlying
13 credits that come out of these surveys through our
14 distribution system that serve as the basis of the
15 music use numbers, in terms of the surveys, to first
16 identify the performances.

17 As I said, on the television networks, for
18 example, we do a complete count of performances.
19 There you are dealing with three networks, about 12
20 hours of programming a day, and they provide us
21 reports, and that's something we can do in a cost
22 effective manner. In other cases where we have to

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1 rely on samples, we worked with our survey experts to
2 go into great detail to make sure that the samples are
3 representative and that the various performances have
4 an opportunity of coming into our survey.

5 Public television, for instance, just to
6 get to the stage where we're going to identify what
7 music is performance, we group the public television
8 stations throughout the United States in several ways.
9 We group them based on the census regions, as defined
10 by the U.S. Government, the Federal Government.

11 So this takes into account the northeast
12 region of the United States, the New England states,
13 the middle Atlantic states -- Massachusetts, Rhode
14 Island, New York -- and all of those various groupings
15 of states as defined by the Bureau of the Census. We
16 also have the south, the central, and the western.

17 In that case -- in that way, if there is
18 any differences in music use for geographic -- among
19 the geographic states of the country, if there is
20 regional differences in music use, we're going to give
21 that an opportunity to be reflected in our survey. We
22 want to make sure that we can pick up those

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1 performances, so members -- those types of
2 performances have an opportunity of getting paid for
3 their work.

4 Now, this is what we do for public
5 television. Depending on the media, this may differ.
6 For radio, for instance, we go into more detail. We
7 go into nine census districts as defined by the Bureau
8 of the Census. We break the northeast into the New
9 England states and the middle Atlantic states
10 separately, because we have 10,000 radio stations and
11 it makes some sense to do that.

12 With 2- or 300 public television stations,
13 it doesn't make as much sense to go into that fine a
14 level of detail. So for television we have the four
15 geographic regions. Within each of these regions, we
16 also take into account economic importance.

17 We group the stations based on how much
18 revenue they generate to ASCAP, the license fees
19 essentially. So, in this case, if there are stations
20 that generate these -- in excess of \$20,000 -- \$20,000
21 or more -- we would group those within each of the
22 regions -- stations in the northeast that generate

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1 fees of \$20,000 or more. We would pick stations that
2 generate fees in the equivalent of \$10,000 to \$19,999,
3 and so on. We actually have seven different
4 groupings.

5 We also take stations that generate fees
6 between \$5,000 and \$10,000, between \$1,000 and \$5,000.
7 So, again, we've got groupings by four geographic
8 regions and by economic importance within geographic
9 regions.

10 Our survey experts then would draw samples
11 within each of those various groupings of stations, to
12 make sure that stations that pay us between \$1,000 and
13 \$5,000 in the central part of the United States have
14 an opportunity of having their performances
15 identified. Stations that pay us under \$1,000, the
16 western parts of the United States have an opportunity
17 of their performances being identified, our members
18 being paid for those performances.

19 In the case of television here, in the
20 case of the surveys generally, that assignment of the
21 number of hours we're going to sample, the number of
22 performances we're going to identify, is in proportion

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1 to the money that is available.

2 So if the stations that paid us between
3 \$5,000 and \$10,000, in the northeast part of the
4 United States, for instance, accounted for 10 percent
5 of our collections from public television, they would
6 get 10 percent of the hours that we sampled as a
7 proportion to the license fee. If those stations
8 accounted for 25 percent of our fees, they would get
9 25 percent of the hours. We are making sure we are as
10 precise as we can be for the amount of revenue we have
11 available for distribution purposes.

12 Q How do you go about gathering the data,
13 the census data and the survey data?

14 A It is going to depend, in part, on the
15 media. Actually, before we get to that, I should
16 point out, in terms of public radio, we don't -- these
17 same kinds of groupings that -- the number of stations
18 and the money they pay us don't -- wouldn't support
19 this kind of grouping. So there we strictly do it
20 based on the economic importance.

21 And we would then, again, say that
22 stations that pay us the equivalent of \$20,000 or more

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1 would be sampled as a group in proportion to their
2 revenue.

3 In our system, stations that pay us
4 \$10,000 or more are automatically going to appear on
5 our survey at some point during the year. We call
6 those self-represented stations. They are guaranteed
7 of coming in at some point.

8 In the other cases, then they get below
9 \$10,000, our independent survey experts will select
10 some of the stations to represent that entire grouping
11 of stations. They will select some of the stations at
12 random that will represent the entire grouping.

13 MR. RICH: Can you keep your voice up,
14 please?

15 JUDGE GULIN: When you talk about the
16 stations paying you in these categories, the stations
17 aren't actually paying you individually, are they?

18 THE WITNESS: Well, that's a good point.
19 In the case of public broadcasting, they are not. In
20 the case of commercial radio or television, we get
21 fees from each station, and we would -- we would
22 allocate it here.

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1 What our survey experts do in this case
2 they get information from the Corporation for Public
3 Broadcasting that is proprietary to them. They don't
4 share it with anybody -- they don't share it with
5 anybody at ASCAP -- that allows them to allocate the
6 fee that public broadcasting pays us among the various
7 stations, that way so they can select the sample.

8 All we get from our survey experts are the
9 stations to be sampled and the specific dates and
10 times. They also select not only the stations that we
11 sample, but they give us more information. They say,
12 "This station on Thursday, March 19th, from noon until
13 6:00 in the evening, we want those performances."
14 Technically, they don't send it to us per se.

15 We have -- we have -- in the case of radio
16 and television, we rely on tapes, among other media,
17 to get back to your question. And to the extent that
18 we have independent contractors as tapers, they
19 contact them directly, and they would only tell the
20 ASCAP staff after the fact, after the time has passed.

21 But you're right, in public broadcasting
22 -- radio and television -- it is one lump fee, and

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1 they have to -- our survey experts allocate it among
2 the various stations and follow this procedure.

3 With commercial radio, we actually get
4 payments for 10,000 customers, and we can do the
5 groupings, and they can select the stations that way.

6 In terms -- well, the survey experts then
7 select the specific dates and times. In television,
8 typically we're relying on cue sheets, documents
9 prepared by program producers or distributors that
10 identify what music is used in individual
11 performances. That is typically the source of our
12 information.

13 I guess the first step, really -- I'm
14 getting a little ahead of myself -- the first step,
15 once we get a station, date, and time -- on television
16 we have to identify what programs are actually
17 broadcast during that time period. And there we turn
18 primarily to two companies that provide that
19 information to us in electronic form. They provide
20 program schedules.

21 These are companies that typically are
22 providing similar information to your local newspapers

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1 when you see those nice grids that have the TV
2 listings for all of the stations in your market. They
3 do this to several thousand newspapers throughout the
4 country, so they have this information for the entire
5 United States.

6 We also supplement that, where necessary,
7 with things like TV Guide or other published sources
8 of information. That would tell us these programs are
9 broadcast on the various stations for the dates and
10 times that we're concerned about.

11 Cue sheets, in the case of television, are
12 documents that tell us what music is performed in
13 those various programs, and then we have a staff that
14 has the unenviable task of having to match up what is
15 performed with the music use information, the cue
16 sheets. They have to make sure all of this data ties
17 together so the members can get paid properly.

18 Actually, a lot of it in the last several
19 years has become automated. Up until the early '90s,
20 a lot of that was more manual work. Now it has really
21 become automated. And, in fact, we have a sample cue
22 sheet in the testimony behind a tab that says "Sample

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1 Cue Sheet," if you wanted to take a look at it.

2 This is for one program called Beyond Wall
3 Street: The Art of Investing, a 1997 program,
4 something from last year. In this case, it simply
5 tells us if there was -- the theme to the program that
6 was used in the beginning of the show, and of the
7 closing credits written by a gentleman named Steven
8 Goldstein, and it tells us the length of the music,
9 and then it tells us that the WNET logo was also used
10 at the end of the show.

11 We would have similar documents from --
12 for other programs. We typically get them from the
13 program producers or distributors. Over the last
14 couple of years -- they used to be -- a lot of those
15 used to be paper documents. Over the last couple of
16 years, we developed computer software that allows
17 program producers to actually input the music use
18 information directly into the software and to ship it
19 to us electronically.

20 And we are working with the various
21 producers and distributors -- our customers -- to see
22 if they could do that. It has helped make their cue

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1 sheet preparation easier, and it certainly helped make
2 our distributions easier. Getting that data
3 electronically avoids having to keypunch it and do a
4 lot of other manual work.

5 All of things have really allowed us to
6 essentially change the cost structure of doing our
7 surveys, of identifying performances, and in many
8 cases have allowed us to increase the size of our
9 surveys. Up until 1995, for instance, we strictly
10 relied on a sample for public television performances.

11 Starting with the fourth quarter of '95,
12 we were able to do a complete count of the programs on
13 the largest PBS stations, the ones that essentially
14 would fall into this category, the 20 or 30 or so most
15 significant stations. Instead of relying on a sample,
16 we can now do a complete count of the syndicated
17 programs and the feature films that those stations
18 transmit.

19 We still do a sample of the locally
20 produced programs on those PBS stations, but we do a
21 complete count of the syndicated programs, the
22 programs they get from PBS and other distributors, as

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1 well as any movies and other programs of that type
2 that they transmit to the public. And that's -- and
3 that's really because of some of these -- this
4 automation allowed us to change the cost of doing the
5 surveys.

6 BY MR. SHORE:

7 Q Okay. Would you describe the process by
8 which the raw data -- for example, the cue sheet which
9 you referred to -- gets transformed into a credit?

10 A Well, that really brings us to the next
11 part of the process, having to identify these
12 performances, whether they are through cue sheets or
13 tapes. We also make a lot of audio and videotapes, in
14 case we don't have cue sheets, also to allow us to
15 check cue sheets. In the case of radio, we make
16 audiotapes as well to identify performances.

17 Once we've identified the performances,
18 the station on which they occurred, the time in which
19 they occurred, how the music was used, all of those
20 things are critical and they get identified as part of
21 the survey process. It then goes into the
22 distribution system, which assigns weights and values

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1 to it.

2 The distribution system is very much part
3 of that 1960 order, the consent decree that I
4 discussed that is part of the agreement ASCAP reached
5 with the Department of Justice. And behind a tab
6 labeled "1960 Order" there is actually a copy -- a
7 copy of that document, and the last 15 or so pages of
8 it lay out the various types of distinctions we make
9 among different types of music, in terms of coming up
10 with these values.

11 But, essentially, one critical distinction
12 we make is how the music is used. Type of use is one
13 important part of the weights or values. We
14 distinguish among feature performances. When an
15 artist appears on The Tonight Show or The David
16 Letterman Show, for instance, and plays a song for
17 three minutes -- and that is what the audience is
18 watching, that is the focus of audience attention --
19 or when a song is played on a radio station, feature
20 performances are one of the types of use.

21 In our system, they receive a weight of
22 one credit. They are kind of the benchmark against

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1 which everything else is measured. All of the other
2 weights and values are going to be in terms of
3 percentages of that one credit that a feature would
4 receive.

5 We also take -- treat themes as another
6 category, the opening or closing to a program,
7 something that identifies a television program as
8 being on the air. In the case of the cue sheet that's
9 attached here, it's the Beyond Wall Street music theme
10 that plays at the beginning of the program and at the
11 end of the program.

12 Themes generally would receive 25 percent
13 of the credit in our system. We would have background
14 music as another category, and background music -- and
15 these first two uses, by the way, are strictly based
16 on a performance. The performance of a theme gets one
17 -- feature gets one credit. Performance of a theme
18 gets 25 percent of the credit, nothing durational
19 based.

20 Background music is one of the first times
21 where you take duration into account. In the case of
22 background music, we would give 14 percent of the

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1 credit for every minute of background music that is
2 used, or 42 percent for every three minutes. And it's
3 pro rata based on the number of seconds.

4 We also would deal with music and
5 advertising jingles, and the like, that are used in
6 commercial announcements. These types of uses,
7 especially for commercials, would get three percent of
8 the credit for the types of use -- for those types of
9 uses. So we're saying there are different values
10 depending on how the music is used. If it's a feature
11 that's the focus of attention, it gets one credit.

12 The theme that plays at the beginning of
13 each and every program gets 25 percent of the credit.
14 Background music gets 14 percent of the credit.
15 That's, you know, the kind of music like under a car
16 chase scene in a police drama, or under -- under the
17 action in any other kind of drama, under the hospitals
18 scenes in ER or Chicago Hope, or some of those types
19 of programs, that type of uses. Music and advertising
20 would get three percent of the credit.

21 The weights reflect a couple of things.
22 The weights reflect the general business practice that

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1 when creators of music license their works to be used
2 in audiovisual materials, how the music is used is
3 important to them. It determines the price they are
4 willing to ask.

5 It also -- all of these weights have to be
6 approved by ASCAP's Board of Directors, and they also
7 have to be submitted to the Department of Justice. If
8 we ever want to change any of the weights, we have to
9 tell the Department of Justice; they have 30 days to
10 review it and comment if they want to. In some cases,
11 we actually have to go to the federal court for
12 approval and put the members on notice in advance of
13 some changes we are going to make.

14 All of those are part of the 1960 order,
15 and this is the way -- at least since 1960 -- we've
16 been paying our members. These systems were all
17 designed to take the money that we collect from our
18 customers and pay it out to our members who have had
19 performances.

20 One underlying philosophy I probably
21 should have started with for this distribution system
22 is what we call the "follow-the-dollar" concept. And

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1 it shows up in a couple of different ways. One part
2 of that means that we take the money we collect from
3 public television stations and we pay it out for
4 performances on public television stations, we collect
5 -- we take the money we collect from public radio
6 stations and pay it out based on performances on
7 public radio stations. The same thing with commercial
8 radio. The fees that come from commercial radio get
9 paid out to the members who have had performances on
10 commercial radio.

11 It also goes back to that sampling concept
12 that the hours that we sample are allocated among
13 stations in proportion to the money that comes from
14 those groupings of stations. So, again, the dollars
15 that are at stake drive the sampling and the
16 distribution.

17 We make certain other distinctions besides
18 the type of use in the distribution system. One issue
19 is where the music is performed. That's probably what
20 I should have used -- the different colors.

21 When our survey experts select the various
22 stations for sampling, each station gets a weight.

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1 The weight has two parts to it that depends on how
2 much in terms of license fees -- either the station
3 pays us directly if it's a commercial station, or the
4 equivalent allocation that our survey experts have
5 made to the various public television and radio
6 station. So larger stations -- stations that generate
7 more money -- get a higher weight, and a performance
8 on those stations would result in more credits and
9 more money to our members.

10 In addition, there is the statistical
11 component. Where we do a sample, we have to take into
12 account the depth of sampling. If we're sampling one
13 out of every 10 hours, we would have to multiply the
14 results by 10 to make sure everybody is being treated
15 fairly. So there is a weight applied to each station
16 to reflect both of those components.

17 In some cases, time of day may also come
18 into consideration. Performances on network
19 television during prime time, for instance, 8:00 to
20 11:00 in the evening, would receive one value, 100
21 percent of the value. Performances at 2:00 in the
22 morning would receive a lower weight, to reflect the

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1 fact that there is less money being generated at that
2 time of day.

3 So there are some distinctions among time
4 of day, particularly in television. There aren't in
5 radio. In radio, we treat all of the day parts the
6 same, in large part because with 10,000 stations it is
7 awfully hard to come up with systematic patterns that
8 apply across the spectrum. In network television,
9 it's a lot easier. Local television, public
10 broadcasting, and cable fall somewhere in between. So
11 we have time of day distinctions there as well but not
12 as -- not as many of them as we have in the case of
13 the networks.

14 Q Why are network television and local
15 television treated differently in the survey?

16 A Well, it really goes back to the "follow-
17 the-dollar" concept again. We have separate license
18 agreements with the three television networks -- ABC,
19 CBS, and NBC. And we have a separate license
20 agreement with the local television industry.

21 And so what we're doing is taking the fees
22 that are generated by network performances and paying

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1 it out to members who have had network performances;
2 similarly, fees from local stations being paid out to
3 the people who have had performances on the local
4 stations.

5 The network license covers the
6 performances during the network television programs.
7 The local stations have a separate license for the
8 rest of their programming -- all of the syndicated
9 programs, the movies, the locally produced programs
10 that they acquire separately from the network. So
11 you've got two separate licenses, two separate streams
12 of revenue, and we do our surveys and distribution
13 separately following the way the license fee dollars
14 comes in.

15 Q With respect to your testimony here today,
16 what analysis did you do of the credits awarded in the
17 various media that you have described?

18 A Well, after we went through all of this
19 process, after we have taken the thousands and
20 thousands of performances that have been identified
21 through the survey, and then processed through the
22 distribution system, we come out with credits. And we

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1 keep all of that -- the detailed information, title by
2 title, performance by performance.

3 Once we've done it -- once we've
4 identified the credits at the title level, the next
5 step is to determine who wrote the music that was
6 performed and who published that music, and what the
7 various writers and publishers and titled shares are
8 for each of those compositions.

9 In some cases it's simple, and in some
10 cases you have one writer and one publisher for a
11 song. And if you had 100 credits generated, you could
12 pay 100 credits to the writer and 100 credits to the
13 publisher. In other cases, you may have two, three,
14 four, five, or more writers, and we have to split the
15 money up for that performance of that song among the
16 various writers.

17 Now, when they -- the writers tell us that
18 when they register the works with us. They let us
19 know who their co-writers are and what share each is
20 entitled to, who the publishers are. So we have to go
21 through our computer records and match up the titles
22 to the various entitled parties and produce the

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1 credits and the dollars that will show up on the
2 members' statements each quarter.

3 I started with the back end -- the
4 historical information -- that existed in our computer
5 systems, based on where the performances occurred,
6 whether it was local television, network television,
7 public television, the types of performances, the
8 various stations, and summarized that to -- to come up
9 with the figures that were used in this analysis. And
10 I couldn't use the numbers directly.

11 I also had to make some adjustments to the
12 data to reflect changes that have occurred over time.
13 But it was really that end point after all of these
14 various performances are processed through our system
15 and the members have been paid that was the building
16 blocks of this step. And it was a question of -- of
17 summarizing that information by medium, by type of
18 use, and then adjusting it for various changes that
19 have taken place over time in order to present the
20 time series that are shown in Appendix 2 of my
21 testimony.

22 I should point out, I suppose, for

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1 completeness, and so not to insult somebody, when I'm
2 talking about members I'm also talking about the
3 members of foreign societies overseas who write and
4 publish music and licenses in the United States
5 through ASCAP. For these purposes, we're treating
6 them as members as well, although technically they're
7 members of international societies and have agreements
8 with them.

9 MR. KLEINBERG: I can't hear.

10 CHAIRPERSON GRIFFITH: If you can speak
11 up, please.

12 THE WITNESS: I will certainly try. I'm
13 sorry.

14 MR. SCHAEFFER: Norman, maybe you ought to
15 sit closer.

16 MR. KLEINBERG: Well, I guess I could.

17 MR. SCHAEFFER: He is very soft spoken.
18 I'm sure we wouldn't have any objection.

19 MR. KLEINBERG: Well, I think that's --
20 I'll sit here.

21 THE WITNESS: In terms of the adjustments,
22 the first thing we did was summarize the data so that

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1 we had it by medium, so that we had it for the public
2 TV stations, had it for local TV, network TV, radio,
3 commercial radio generally, and the NPR stations.
4 That is the first level of summary we did. We do
5 other surveys for distribution purposes as well, but
6 they weren't really relevant here, so we didn't
7 include those.

8 We also had type of use as discussed
9 before -- features, theme, background, and the various
10 other types of use. We had to deal with the quarter
11 in which the performances took place. We process
12 these distributions on a quarterly basis, so we
13 summarized it by quarter as well, because some of
14 these weights will have changed over time at specific
15 quarters, and we had to make some adjustments for
16 that. And I'll talk about why in a minute.

17 And we also had to take into account type
18 of -- time of day, again, because some of those
19 weights changed over time, and we had to -- we had to
20 take that into consideration.

21 BY MR. SHORE:

22 Q What years were you looking at?

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1 A We're looking at our survey years 1990
2 through 1995. And just to be totally clear, our
3 survey year is kind of like the fiscal year here. It
4 runs from October of one year to September of the
5 following year. So survey year '90 would have been
6 performances processed for October 1989 through
7 December -- excuse me, through September 1990.

8 And, similarly, survey year 1995 would
9 have been October 1994 performances through September
10 1995 performances. I just want to make sure I've got
11 all the factors here. You had medium, you had type of
12 use quarter, time of day --

13 Q Station weights?

14 A And the other thing we had is we had one
15 more distinction for the networks. We -- in the
16 television networks only, the frequency of performance
17 can make a difference. We have a set of rules that
18 apply to programs that are performed four or more
19 times a week -- The Tonight Show, the soap operas,
20 Good Morning America, those types of shows -- as
21 opposed to shows that are broadcast less than four
22 times per week.

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1 And so we had to take that into
2 consideration because there were some adjustments that
3 we required there.

4 Q What was the approximate size of the data
5 set you were working with for these six years?

6 A Well, I don't remember precisely, but it
7 was ultimate -- the original data set was tens of
8 millions of records. That's one of the reasons we
9 summarized and came down to these numbers, to make it
10 more manageably.

11 Frankly, the individual performances and
12 the individual dates were less critical than the
13 summaries by the medium in these categories, so that
14 reduces substantially the original data set that was
15 tens of millions of records that we processed through
16 our distribution -- our mainframe computer every
17 quarter.

18 Q Okay. And can you explain why cable
19 television wasn't included in here?

20 A Cable hasn't been included at all
21 throughout the discussion. The single main reason is
22 because we -- right now, we have been on what is known

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1 as interim fee status. We have not had final fees
2 with the cable industry since 19- -- 1988, if I recall
3 correctly. Everybody has been paying us on account
4 since that time, and we have been -- had negotiations,
5 in part, and we have got a proceeding pending before
6 the federal court to determine fees for the cable
7 industry for that entire period.

8 So we didn't have a final fee benchmark on
9 the licensing or revenue side to start with, and,
10 therefore, we didn't include the music use as well.

11 Q Now, turning actually to Appendix B, could
12 you explain for the arbitrators the meaning of the
13 chart on page 6, the results for public television?

14 A Sure. This chart summarizes all of the
15 information we have just been talking about, in terms
16 of music use and how the music is performed and the
17 various weights that were applied. And this deals
18 with all of the various adjustments we made.

19 The adjustments, as I mentioned, were
20 because some of the weights changed over time.
21 Background music, for instance, at one period of time
22 got 36 percent of the credit for every three minutes.

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1 It was later changed to 42 percent.

2 You would have had -- when you look for
3 the time series, if you didn't adjust for that change,
4 it would have looked like music use was going up or
5 down, depending on which way the weights worked. And
6 that would have really distorted what was happening,
7 so we had to put everything on a common basis.

8 This says -- this reports on the music use
9 and the public television stations, and expresses it
10 in terms of music use credits per hour. If you take
11 a look at the first year, for instance, survey year
12 1990 would be performances from October 1989 through
13 September 1990. In that period of time, we were doing
14 a sample survey of public television, and the sample
15 size was 1,200 hours over the course of the year. So
16 that's what is shown in the third column.

17 The second column, ASCAP credits, shows
18 the number of credits that were generated on the
19 various public television stations. Once you've
20 included the weights for the different types of uses
21 -- feature, theme, background, and any other types of
22 uses -- those weights perhaps haven't been adjusted if

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1 there was any change over time, so that the numbers
2 from 1990 through 1992 through 1995 would be
3 comparable.

4 The last column on the right takes the
5 credits in the first column -- 1,864.8 -- divides them
6 by the size of the survey -- 1,200 hours -- and says
7 that translates, on average, into 1.55 credits per
8 hour. Now, this doesn't have the underlying detail in
9 terms of the type of use, but that would be one and a
10 half features on average per hour, or a combination of
11 feature, theme, and background music.

12 But when the various weights and values
13 are taken into account, it tells you the amount of
14 music that was used under ASCAP's weighting and
15 distribution system. The primary importance of this
16 is we're going to be able to compare it to local and
17 network broadcasts to see relative uses of music.

18 Remember, back in the formula we were
19 talking about originally, we were using the commercial
20 stations as a benchmark. We've got the revenue from
21 the commercial broadcasters and the revenue from
22 public broadcasters, so we've got a relative measure

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1 there as well as the license fees that the commercial
2 broadcasters have agreed to pay and ASCAP has agreed
3 to accept.

4 Here we've got the relative music use to
5 relate to the relative economic importance. So we
6 take the credits per hour for public broadcasting as
7 compared to the credits per hour of commercial
8 broadcasting to see if -- which one uses music more
9 intensively. This first table on page 6 deals with
10 public television and shows the changes in the credits
11 over time. And charts on similar pages -- for
12 instance, on page 7 -- reports the results of our
13 survey on distribution system for local television for
14 that period of time.

15 I should point out a map on the column in
16 dealing with the sample size, you can see there is a
17 footnote. We have been expanding and changing the
18 size of our local television survey throughout the
19 1990s. We originally started -- for many years
20 preceding this we had a sample of 30,000 hours of non-
21 network programming by the commercial stations.

22 We gradually, through getting program

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1 information electronically, cue sheets electronically,
2 we have been able to expand that where we now do a
3 complete count of all of the syndicated programming
4 and feature films on all of the local television
5 stations throughout the country. Any of those
6 programs that have been performed get picked up, and
7 our members will get paid.

8 We still do a sample on locally produced
9 programming, primarily news and sports programming,
10 public affairs programming. But on the syndicated
11 programs and films, we do a complete count.

12 As we have made those changes, our survey
13 experts have adjusted the station weight, the
14 statistical weight, to reflect the changes in the
15 depth of sampling, so that all of those various
16 weights are still equivalent to the 30,000-hour sample
17 size. And rather than adjusting for changes in
18 station weight, it was easier to hold the sample size
19 constant, since the weights have all been adjusted to
20 reflect that and still do the analysis.

21 Page -- and you can see for 1990, for
22 instance, then, that on local TV the stations used

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1 39,685 credits, or 1.32 credits per hour, as compared
2 to the 1.55 on public broadcasting for the same year
3 in the past.

4 The next table, page 8, shows the separate
5 results for the commercial television networks
6 relating to our complete count of the network
7 programming that has been occurring over all of these
8 years and provides similar information. Again, the
9 first line, 1990, shows ASCAP credits generated
10 through our survey and distribution system of 19,510
11 credits in a survey size of approximately 13,000
12 hours, which translates into one and a half credits
13 per hour.

14 Now, in order to do this analysis to get
15 the denominator -- the bottom part of this equation --
16 music use for the commercial stations, I needed to
17 combine the network and the local performances because
18 the revenue over here is for network and local
19 revenue. And we have to get performances combined as
20 well to match up, which is really what the next part
21 -- the next two pages -- pages 9 and 10 -- of the
22 appendix do.

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1 What we did was take a look in our records
2 for 1995 and -- if I might -- in some cases it's easy.
3 The independent stations -- the independent stations
4 weren't a problem. I forget the station since I lived
5 here in Washington. Is it channel 29 or 25, W -- one
6 of those is a commercial station that always used to
7 have great old movies and things like that. They
8 account for and pay for the full broadcast day, 24
9 hours. They are not affiliated with ABC, CBS, or NBC.

10 They acquire all of their programming,
11 they pay us a fee based on their entire programming,
12 we do a survey and distribution based on their entire
13 programming. For them it was easy. We could count
14 the whole day. For the network affiliates it was a
15 little trickier because the programming comes in two
16 parts.

17 The stations themselves have programs that
18 they pay for under the local television license, and
19 we survey that and distribute for that. That's the
20 syndicated programming, and the locally produced
21 programming, such as news and sports that they have,
22 and it's also the programs that the network provides

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1 to them.

2 They don't -- under the license, they're
3 not paying for those programs, but they are
4 transmitting the programs to the public. We are doing
5 our survey separately for that, doing our distribution
6 separately for that. But for these purposes, we had
7 to combine the various sources of programming.

8 So we took a look, in 1995, at the hours
9 that the affiliates were on the air and came up with
10 a total for that. We found that there was about 595
11 stations that were affiliated with NBC, CBS, and NB --
12 ABC, CBS, and NBC for that year. And they averaged
13 about 12 hours of network programming per station per
14 day, 11.9 hours. They also averaged about 10-1/2
15 hours of non-network programs for day.

16 So we were able to figure out the total
17 hours and how much of it was network programming, how
18 much of it was local, and we were able to use those
19 weights to combine the figures shown in the prior two
20 tables for local and network TV separately into one
21 common, overall measure that we could then compare to
22 the music use on the public television stations.

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1 In the case of public television stations,
2 we are measuring and surveying each of the stations
3 independently and picking up all of the programming
4 through that source. We are not making distinctions
5 as to whether PBS is providing it, the station is
6 providing it, or any other distributor or source of
7 programming is providing it.

8 Q What were the results of your comparison
9 of music use on television?

10 A We focused on the 1995 year to match the
11 revenue information we had for both the commercial
12 stations and public broadcasting. In the case of
13 public TV, it showed on average that public television
14 stations in that year used 41 percent more music than
15 the commercial counterparts. They used 1.99 credits
16 per hour, which compared to 1.41 credits per hour on
17 the network and local stations from the various tables
18 in Exhibit 2. And the ratio of that, then, was 1.41
19 -- 41 percent more music.

20 So what we did was go back to the
21 effective rate that we calculated earlier this
22 morning, where we said that commercial stations with

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1 \$741.9 million in private revenue had the effective
2 commercial rate of 44/100ths of one percent would have
3 paid an equivalent of \$3,464,000, where the public
4 stations as a group with that much private revenue --
5 that would be an appropriate benchmark for starters.

6 And then we said that given this level of
7 music use, you should increase that as well. And when
8 you do that multiplication, that would get you a
9 proposed fee of \$4,612,000, adjusted for revenue and
10 adjusted for music use. And maybe in case it's hard
11 to read now, four million -- based on 1995
12 information.

13 We did a similar calculation for radio.
14 It's probably up here, right? In radio, this morning,
15 we've shown that the effective rate was 1.25 percent.
16 Radio stations were paying \$1.25 out of every hundred
17 dollars of revenue for access to the ASCAP repertory.
18 The private revenue for the public radio stations
19 covered by this agreement was \$276.5 million, and at
20 that same effective rate that would yield \$3,456,000
21 in fees, just taking into account the economic
22 adjustment.

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1 But we went through the same survey
2 results for public radio for 1995. We found that they
3 used a little less music than their commercial
4 counterparts, about 3-1/2 or four percent less music.
5 So the music use ratio in that case was 2.74 credits
6 per hour on the public radio stations. The commercial
7 stations was 2.84 credits per hour. Those are shown
8 in Appendix B. The ratio of those two was 0.96, 96
9 percent, about 3-1/2 or four percent less music used
10 on the public radio as compared to commercial radio.

11 So we made a similar type of adjustment --
12 \$3,456,000 fee attributable to economic adjustments by
13 the 96 percent, which led to \$3,370,000 based on
14 comparisons between public radio and the commercial
15 stations and their counterpart adjusted for economics
16 and for music use.

17 Q How did the music use ratios change from
18 your previously filed testimony?

19 A Let me get it up here before I forget it.
20 The first time we went through and reviewed it, we
21 found that there were some adjustments that had to be
22 made to the music use figures I had originally

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1 reported on commercial television, and they came from
2 two sources.

3 One, we had changed our survey and
4 distribution system over the years, particularly
5 around the 1994/1995 period, and we are now treating
6 the Fox program -- programming on the Fox network
7 separately and distinctly for survey and distribution
8 purposes. And whenever we process all of this vast
9 amount of data to our internal computer system, we
10 have some internal control numbers, some codes that we
11 use just to be able to track performances through the
12 system.

13 And we assign new codes to the Fox
14 programming that were outside the existing range we
15 had used in the past for local television programs.
16 And when we ran through a first analysis, we missed
17 those codes. When we specified the range to extract
18 the local television, we mixed the -- missed the Fox
19 programming.

20 Now, that had the effect of leaving some
21 commercial programming out of the analysis and had the
22 effect of reducing the average music use per hour on

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1 local stations. And since this is a relative ratio,
2 that would have made public television look like it
3 used more music compared to commercial television,
4 which would have meant that ultimately it would have
5 made this number higher than it should have been. So
6 we had to make that adjustment.

7 It also turned out, in going through the
8 analysis, that the last quarter of 1995 -- it also was
9 in this figure -- dropped out of the computer
10 calculations at some point, and I'm not sure why or
11 how. Again, that would have distorted the numbers and
12 made public television look like it was too high
13 relative to commercial television and would have
14 overstated the fee request. So we made that
15 adjustment and came up with a lower number.

16 We then, in terms of -- there was a second
17 provision. We initially provided some summary
18 information to PBS and to the other parties. We
19 ultimately provided much more detailed information on
20 the tens of millions of records. And once we had that
21 common data set extracted, we reran all of the
22 calculations from that data set, so that everybody was

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1 dealing with the same source of information. And that
2 led to some minor adjustments in the various figures
3 as well, as reflected in this current testimony.

4 Q How did you get from the 1995 rate of
5 7.98 million to the proposed fee in this case?

6 A Well, that is the proposed fee in this
7 case. That's what we -- at this point, in terms of
8 fees. But you're right, it's a 1995 figure, and this
9 deals with a 1998 through 2002 proceeding.

10 One way to adjust it -- well, there are a
11 couple ways to adjust it. One way would be to do the
12 same kind of analysis for subsequent years that you
13 have the information. One way would be to have the
14 public broadcasting information for later years,
15 commercial broadcasting information for later years,
16 and see if that has changed.

17 Those data aren't available at this point
18 in time, at least as far as I know -- not in their
19 entirety -- and they aren't necessarily available for
20 the future. So that wasn't possible.

21 Another way is to trend it -- to adjust it
22 for changes in CPI, and I did a calculation on that.

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1 Q Where do you get --

2 JUDGE GULIN: Before you get into CPI --

3 THE WITNESS: Sure.

4 JUDGE GULIN: I don't know how important
5 it is, but I went through your analysis and I get a
6 slightly different number.

7 THE WITNESS: Oh, really?

8 JUDGE GULIN: I get 4,602 for public TV.
9 You may want to check that.

10 THE WITNESS: Okay.

11 JUDGE GULIN: 4,602,000 rather than 612.
12 And I thought, just by looking at the board, maybe it
13 was a result of you rounding off some numbers there.
14 But --

15 THE WITNESS: No. It may also --

16 JUDGE GULIN: -- you have gone through the
17 -- the more detailed analysis. I keep coming up with
18 602.

19 THE WITNESS: All right. Let me -- let me
20 check it. I don't have my calculator with me. It may
21 well be that some of these are carried to more decimal
22 points.

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1 MR. SCHAEFFER: Maybe Paulos can --

2 THE WITNESS: All right. Well, you're
3 right. We will check that and tell you whether --

4 JUDGE GULIN: Okay.

5 THE WITNESS: -- the number should be --

6 JUDGE GULIN: Very well.

7 THE WITNESS: -- 4,612 or 4,602. I
8 suspect that you're right. I think it probably does
9 deal with some of the rounding that went on in the
10 intermediate steps, and the fact that these are
11 carried a couple decimal points. But we'll check
12 that. Thanks for pointing that out.

13 We took a look at the CPI changes from
14 1985 through -- 1985, right -- from 1995 to 1997, and
15 then adjusted it for one more year through 1998, based
16 on the results for those two years. And that showed
17 that over the period -- the CPI from 1995 to 1997
18 averaged about a 2.6 percent per year increase.

19 The CPI table is shown in the tab
20 immediately following Appendix C that's labeled CPI
21 Table. So we took the CPI for 1997, which is 160.5,
22 divided by 1995, which was 2 -- and that was a 2.6 per

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1 year change on average, used that same 2.6 percent as
2 a projection for 1998, for one more year, that led to
3 an overall adjustment of 8.2 percent. So multiplied
4 this by 1.082, that would increase this to an
5 estimated fee of \$8,636,000 in estimated 1998 constant
6 dollars, keeping the same value for 1995 constant in
7 terms of constant dollars. So there would be no
8 erosion for inflation based on the estimate for 1998.

9 Of course, if you're right, Commissioner,
10 and I've got \$10,000 off in the calculation, that
11 would change as well. And I'll have to go back
12 through and check that as well, but that's not what we
13 proposed. Our proposal is based on that document.

14 BY MR. SHORE:

15 Q Would you briefly describe the trending
16 analysis that is in your testimony? Just briefly. It
17 begins at page 9, paragraph 19.

18 A This is another way of getting a second
19 measure of this and trying to check the work. We went
20 back to the original decision of the Copyright Royalty
21 Tribunal in 1978 and took those fees that the Tribunal
22 set and adjusted them for changes in economics and

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1 music use over those -- the time period between 1978
2 and the present, over that 20-year time period.

3 So the formula, essentially, is to take
4 the 1978 fee and adjust it for changes in revenue --
5 so in this case it would be 1995 revenue -- from CPB
6 versus 1978 revenue. A little different than here.
7 This says the public television revenue in 1995 as
8 compared to the public television revenue in 1978. So
9 it is growth strictly in public television, and, of
10 course, public radio done separately as well.

11 And then I'd like to adjust it for changes
12 in music, because ideally 1995 music use on public
13 television versus 1978 -- this is closer to the type
14 of analysis Judge Conner did when he did his decision
15 on the network television case.

16 We didn't have music use data readily
17 available or here. We didn't start our surveys until
18 slightly after that. Plus, they weren't easy to
19 retrieve from the computer, so I was only able to use
20 the data that were in Appendix B, which is really
21 1990. So that's not directly comparable and it's
22 missing 12 years of data. You have to either make the

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1 assumption that nothing happened, or you'd have to go
2 back and do further work to really refine this and
3 fine tune it.

4 The revenue information was available from
5 the Corporation for Public Broadcasting for those
6 years. The first thing I had to do on the fee was a
7 lump sum fee of a \$1,250,000 for both television and
8 radio, the way it was set then, so I had to break that
9 out between -- allocate part of that to television and
10 part of that to radio.

11 I did that arbitrarily based on the share
12 of private revenue in 1978. It turns out in that year
13 that 88 percent of the revenue came from public
14 television and 12 percent from public radio, then
15 adjusted it for the changes in music use or changes in
16 revenue. In public television, the revenue increased
17 from \$152.8 million to \$741.9 million.

18 Q This is just private revenues, isn't it?

19 A Just private revenues, just TV in this
20 case.

21 I did a similar calculation for public
22 radio. The numbers are shown on pages 9, 10, and 11.

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1 And the upshot was when you added both pieces
2 together, you came up with a fee of \$8,225,000 doing
3 it that way.

4 Q Okay.

5 A Now, the arbitration allocation of the
6 1978 fee was arbitrary, and we're missing music use
7 there. But that -- they're somewhat in line, so there
8 is a total of \$7,982,000.

9 JUDGE GULIN: Now, why did you use -- go
10 back to the 1978 proceeding to check your work? Why
11 not go back to 1992?

12 THE WITNESS: For the same reason we
13 talked about earlier. All of those agreements between
14 1978 up to the present have been explicitly by
15 agreement of both parties to be non-precedential, not
16 to be cited in future rate proceedings or
17 negotiations. That was the terms we agreed to with
18 the Public Broadcasters.

19 I didn't think you could rely on those.
20 We have explicitly agreed that we wouldn't. That was
21 part of the terms of the contract and what we
22 bargained for. So this was the only objective

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1 benchmark we could fall back on.

2 JUDGE DREYFUS: But this is your proposal.
3 You can rely on what you want for a proposal, right?

4 THE WITNESS: Well, we relied on --

5 JUDGE DREYFUS: I mean, it's not a
6 contract obligation prohibiting you from looking at
7 '92.

8 THE WITNESS: I think the -- I think the
9 license -- I would defer to counsel, but I think that
10 my reading of the license agreement was that these
11 could not be used in any prior rate proceeding.

12 MR. SCHAEFFER: Says "shall not" --

13 CHAIRPERSON GRIFFITH: Anything else?
14 Mr. Kleinberg?

15 MR. KLEINBERG: I have no questions at
16 this time.

17 CHAIRPERSON GRIFFITH: All right. Mr.
18 Rich?

19 MR. RICH: Thank you.

20 CROSS EXAMINATION

21 BY MR. RICH:

22 Q Happily, Dr. Boyle, I am still pre-

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1 arthritic. I hope you don't mind if I stand. It has
2 been a bit of a long day, so this way I'll stay with
3 the program.

4 You are by now quite an experienced
5 witness for ASCAP in proceedings such as this, isn't
6 that true?

7 A I've testified in several of them. At
8 least four, I believe, in front of the federal courts,
9 and several before the Copyright Tribunal.

10 Q Yes. By my reckoning, you testified in
11 the Showtime case in or about 1988, correct?

12 A Yes.

13 Q And in the Buffalo Broadcasting rate case
14 in or about 1990?

15 A Sounds right. I don't remember the years
16 exactly. That's -- certainly, the Buffalo case, yes.

17 Q And the ABC/CBS network television case in
18 or about 1992?

19 A Yes.

20 Q And I think in that same year, in an early
21 phase of the background music litigation, rate
22 litigation?

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1 A Don't remember that one, but it's
2 possible.

3 Q Okay.

4 A I don't think that got to that stage.

5 Q Actually, you didn't testify live. You
6 may have submitted an affidavit.

7 A Oh, I think that's possibly right in some
8 -- in some original --

9 Q Didn't go the full route of --

10 A No.

11 Q And in each case, you did so as ASCAP's
12 chief economist, is that correct?

13 A Yes.

14 Q I'd like to explore with you some aspects
15 of the testimony in each of these cases. Let's start
16 with Showtime. Am I correct that that rate proceeding
17 entailed determining a reasonable license fee for two
18 pay cable television services, namely Showtime and The
19 Movie Channel?

20 A Yes.

21 Q And am I also correct that the fees that
22 ASCAP sought were based upon ASCAP's fee experience

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1 with other users in the same market, namely HBO and
2 Disney?

3 A Yes.

4 Q That was the benchmark, right?

5 A That's right.

6 Q Other pay cable program services, correct?

7 A Yes.

8 Q Not, for example, ABC or CBS television
9 network, correct?

10 A That's right.

11 Q Not public television, correct?

12 A That's right. Although there was, as I
13 recall, a reference to the other television license
14 agreements during that proceeding.

15 Q There were lots of references, but your
16 benchmark for that proceeding, your preferred
17 benchmark -- that is, ASCAP's -- was other competitors
18 within that industry, correct?

19 A That was the primary one. I think we
20 looked at -- at other parts of the other -- parts of
21 the television industry as well. But the primary one
22 was certainly the pay cable services.

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1 Q And am I also correct that the reason you
2 didn't seek to base fees there on your own prior
3 license experience with Showtime and The Movie Channel
4 was because, as you there testified at trial, that
5 prior experience reflected the earlier days of the
6 industry? It was in a startup mode, is that correct?

7 A I haven't looked at that testimony in a
8 while, but I thought the earlier deal that we had
9 struck went to similar fees, and they were all
10 internally consistent with -- I thought those earlier
11 fees were also consistent with HBO and Disney, and
12 they were all part of the --

13 Q Well, it's a small point and I have your
14 testimony, but let's move on in the interest of time.
15 Okay?

16 Do you recall what level of license fees
17 that ASCAP was asking for in the Showtime/The Movie
18 Channel rate proceeding?

19 A We were asking for fees based on the
20 number of subscribers, and I believe the rate we were
21 requesting was 25 cents per subscriber per year.

22 Q And do you recall the outcome of the case?

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1 A The outcome, as I recall, was a rate of 15
2 cents per subscriber per year.

3 Q And am I correct that a principal basis
4 for the court's opinion in setting that fee were the
5 fees which Showtime and The Movie Channel had earlier
6 negotiated with your principal competitor, BMI?

7 A I believe that was certainly one of the
8 things the court looked at. I think there were some
9 other comparisons that we used in that conclusion as
10 well, but that was one of the things the court
11 analyzed.

12 Q What else can you think of that was more
13 important in the court's determination in setting 15
14 cents per subscriber than the prior Showtime
15 relationship with BMI?

16 A I don't recall explicitly. It was about
17 10 years ago. I think there were some other factors
18 cited as well, but that was one of the main ones
19 certainly.

20 Q And do you recall the court, in using the
21 BMI benchmark, making certain adjustments based
22 principally on its estimation of relative music usage

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1 by Showtime of the respective ASCAP and BMI
2 repertories?

3 A No, I don't. I thought the court looked
4 at the relationship between the ASCAP and BMI fees and
5 other industries, because the data we put in on music
6 use showed that Showtime was using twice as much music
7 -- ASCAP music as BMI music, which would --

8 Q Do you recall --

9 A -- which would have supported the 25-cent
10 fee.

11 Q Do you recall both the District Court and
12 the Second Circuit finding methodological problems
13 with your data in that case?

14 A I don't recall the wording. I recall that
15 they used other sources of information, but I don't
16 think it was relative ASCAP/BMI music use. As I
17 recall, that was the only information on ASCAP/BMI
18 music use in the record.

19 MR. RICH: We'll let the Panel review the
20 cases at their leisure. For the Panel's information,
21 the Showtime opinions, both District Court and the
22 Second Circuit, are already in evidence as PB 1X.

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1 BY MR. RICH:

2 Q Let's talk about the Buffalo Broadcasting
3 rate proceeding. That involved a determination of
4 reasonable license fees for the nation's 1,000 or so
5 commercial local television stations, correct?

6 A Yes.

7 Q For a considerable period of years, yes?

8 A Yes.

9 Q Now, there had been a prior history of
10 negotiated agreements with that industry, correct?

11 A That's right.

12 Q Between ASCAP and that industry?

13 A That's right.

14 Q And the last such prior agreement had been
15 entered into in 1968 for what proved to be a 10-year
16 term, is that correct?

17 A I believe that's right. I'd have to check
18 the dates to be sure. That sounds about the right
19 time.

20 Q At least originally expired in 1977, and
21 then there were some interim rollovers. But
22 basically, 1968 to 1977, correct?

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1 A I think that's right. I think it expired
2 originally in '72, and there was a continuation --

3 Q And that document --

4 A -- maybe '73.

5 Q And that agreement colloquially is known
6 in the trade as the Shenandoah agreement, correct?

7 A That's right. That was the name of the
8 station that was requesting the license fees --
9 Shenandoah Broadcasting.

10 Q But, in fact, on the premise that ASCAP
11 has to license similarly situated users the same way
12 under its decree, all local commercial television
13 stations in the United States who were licensed by
14 ASCAP operated under that form of license, correct?

15 A That's right. I believe at that time the
16 entire industry took that form of license.

17 Q Right. Now, ASCAP, at the trial of the
18 Buffalo Broadcasting rate proceedings, sought
19 essentially to perpetuate the Shenandoah agreement
20 with certain fine tuning for what ASCAP argued was
21 unforeseen inflation at the time that deal was struck,
22 is that correct?

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1 A That's essentially correct.

2 Q And with this summary of ASCAP's position,
3 and yours as its chief economist, drawn from the
4 District Court opinion in that case, which is in
5 evidence as PB 3X, be accurate, "The principal stated
6 basis for ASCAP's espousal of the Shenandoah formula
7 is the assertion that the All Industry Committee
8 representing the stations in negotiations repeatedly
9 agreed to it for local stations, commencing as of
10 1968, and that the stations' approval of this approach
11 in the past is tantamount to proof of its continuing
12 reasonableness"?

13 A I'm sorry. That's a quote? That's a
14 quote from the opinion?

15 Q From Magistrate Judge Dolinger's opinion.
16 Is that a fair summary of ASCAP's essential position,
17 and yours on the stand as its chief economist?

18 A I haven't reviewed that record in a long
19 time either, but that sounds essentially correct.

20 Q Now, the Shenandoah fee formula called for
21 a fee tied to station revenues, is that correct?

22 A Yes, that's correct.

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1 Q And the stations opposed continuation of
2 such a fee structure, didn't they?

3 A Yes.

4 Q And do you recall what the outcome of that
5 case was in terms, first, of ASCAP receiving fees
6 reflecting a continuation of that prior license?

7 A In the decision in the Buffalo case, the
8 Magistrate Judge Dolinger set an industry-wide fee for
9 all of the local television stations, a fee that would
10 be adjusted from year to year based on changes in the
11 Consumer Price Index and changes in the number of
12 stations covered by the license.

13 The fee that he set for the entire
14 industry in the first year of his decision went back
15 to the 1972 fee that was the result of the Shenandoah
16 agreement based on the revenue from the stations, and
17 adjusted that from 1972 to the intervening years based
18 on the same formula, based on changes in the Consumer
19 Price Index and changes in the number of stations.

20 Q And did the resulting fees under the
21 formula you have just articulated exceed or fall below
22 the fee levels which would have been yielded by a

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1 continuation of the prior agreement that ASCAP
2 espoused?

3 A They were less than what would have been
4 -- resulted from the free we were proposing, and more
5 than what -- the fee the industry was proposing.

6 Q The question was --

7 A In between the two.

8 Q My question was not directed at what the
9 industry was proposing, sir. My question was: as
10 compared to the proposal ASCAP put forward as a
11 continuation of the Shenandoah agreement, we are in
12 agreement, are we not, that the fee formula set by
13 Magistrate Judge Dolinger significantly reduced fees
14 below that level, correct?

15 A They reduced them below that level. I
16 don't recall how significantly at this point, but they
17 were lower than what we were proposing.

18 Q What would the Shenandoah formula have
19 yielded ASCAP in 1996?

20 A I don't recall.

21 Q Roughly.

22 A I'm not sure. Well, let's see, the

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1 decision came down in '93. I don't think we have ever
2 done calculations post 1993, post the decision, so I
3 don't know.

4 Q \$150 million a year sound about right?

5 A Sounds high.

6 Q \$140 million a year?

7 A I don't think so.

8 Q What did local television pay ASCAP last
9 year?

10 A Local television last year, in 1997.
11 Probably around \$80- or \$82 million, and I might not
12 be quite precise on that. I haven't looked in the
13 financial records in a while.

14 Q Let's talk about the network television
15 rate proceeding. Several years following -- one
16 moment.

17 When was the last year you performed a
18 "what would the Shenandoah formula have yielded"
19 calculation?

20 A Whatever I testified to in trial, probably
21 1990, maybe 1991.

22 Q Okay. Let's talk about the network

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1 television case. You there testified in ASCAP's
2 behalf in a rate proceeding involving the
3 determination of reasonable license fees for the ABC
4 and CBS television networks, correct?

5 A Yes.

6 Q And you there argued that ABC and CBS
7 should pay license fees at the level that their chief
8 competitor, NBC, had agreed to pay for the years 1991,
9 1992, and 1993, correct?

10 A That's right.

11 Q Now, NBC operates in the same market,
12 correct, as does ABC and CBS?

13 A Yes.

14 Q You didn't there, for example, say that
15 ABC and CBS should pay what HBO pays in the cable
16 industry, correct?

17 A No. Right.

18 Q Or what public television should pay,
19 correct?

20 A Right.

21 Q And I take it you agree with ASCAP's
22 statement in its briefing of the matter before Judge

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1 Conner that, "There is no better measure of a
2 reasonable fee for a license to broadcast ASCAP music
3 on network television than the fees that the networks
4 themselves have agreed to pay in voluntary arms length
5 agreements with ASCAP"? You agree with that
6 statement, correct?

7 A Yes. I don't remember the code precisely,
8 but I agree with the sentiment. Sure.

9 Q But that was consistent with your
10 testimony in that proceeding, is that correct, Dr.
11 Boyle?

12 A I believe so.

13 Q Did ASCAP receive the license fees it
14 sought in the network television rate proceeding?

15 A If I recall correctly, the fees we were
16 requesting were a percentage of revenue, and Judge
17 Conner set a fee that was flat dollars. It was a set
18 amount of dollars for the years, and it was based on
19 taking a look at changes in ABC's revenue from the
20 time of the prior agreement and changes in ABC's use
21 of ASCAP music from the time of the prior agreement
22 with ABC.

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1 We did a similar calculation for the CBS
2 network based on CBS's changes in revenue and music
3 use. And if I recall, the fees came out to probably
4 within five percent or so of what we were asking for
5 in the proceeding, although they were expressed in a
6 different form.

7 Q Do you recall that NBC agreed to pay ASCAP
8 \$11.3 million for the year 1991?

9 A I recall that the request in the license
10 was a percentage of revenue for at least some of the
11 years of 19 -- 1991 and --

12 Q 1993, correct?

13 A If '91 was the first year of the license,
14 that may have been flat dollars.

15 Q And you testified on the stand that ABC
16 and CBS should pay \$11.3 million, likewise, for 1991,
17 correct?

18 A And the percentage -- the appropriate
19 percentage of revenue for the other years. That's
20 right.

21 Q Yes. But if you'd stay with my question,
22 we'll stay focused. Okay?

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1 For 1991, am I correct, that you on the
2 stand requested that ABC and CBS pay the identical sum
3 of \$11.3 million?

4 A I believe so. I haven't reviewed that
5 testimony in a couple of years either.

6 Q And what did Judge Conner determine was
7 appropriate for CBS to pay for 1991?

8 A I don't recall the results of the formula.

9 Q Mr. Reimer testified in your chair
10 \$9.75 million for that year. Does that ring a bell?

11 A Sounds about right.

12 Q And what did ABC pay for that year, do you
13 recall?

14 A Not precisely.

15 Q Mr. Reimer suggested about \$10.45- or
16 \$10.47 million. Sound about right?

17 A Approximately.

18 Q And greater than five percent, is it not?

19 A For that one year.

20 Q And what is your recollection that CBS was
21 required to pay for the subsequent two years, 1992 and
22 1993?

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1 A I believe that both networks -- the fees
2 were at the same level for each of the years of the
3 contract.

4 Q And do you recall --

5 A Now, in ABC's case at least -- in ABC's
6 case, I think there was a five- or six-year
7 retroactive adjustment period as well, and then there
8 may have been a prior period for CBS also. But I'm
9 not too --

10 Q Well, as to ABC --

11 A I'm not sure about CBS. Yes, you may be
12 right about that. That may have been final through
13 '90 or '91.

14 MR. RICH: That opinion, for the Panel's
15 information, is in evidence as PB 4X.

16 BY MR. RICH:

17 Q Do you recall Judge Conner, in
18 articulating the formula which you earlier mentioned
19 to the Panel -- that is, looking at changes in
20 revenues and changes in music use -- also articulated
21 the view that that process should look at recently
22 negotiated agreements in applying that formula, as

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1 opposed to reaching back many years to older
2 agreements?

3 A No, I don't recall that part of the
4 decision.

5 Q Finally, let's talk about the background
6 music proceeding, as far as it got -- again, 1992.
7 You were then serving as ASCAP's chief economist, yes?

8 A Yes.

9 Q And you were then familiar with and
10 formulated ASCAP's position in the Rate Court, as you
11 testify is your function, correct?

12 A Yes.

13 Q And that proceeding entailed a
14 determination of reasonable license fees to be paid by
15 entities such as Muzak and Audio Environments, Inc.,
16 and other so-called background music suppliers,
17 correct?

18 A I think -- yes, that's right. I think we
19 often refer to them as background/foreground music
20 suppliers. But that -- that industry.

21 Q And did Judge Conner, the same Judge
22 Conner you cite, accurately depict ASCAP's court

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1 position in that matter in observing -- this is from
2 the interim fee opinion in that case -- "ASCAP
3 stresses the historical basis for the previous
4 licensing agreements, contending that for both terms
5 -- which is a reference to agreements entered 1982 to
6 1986 and 1987 to 1991 -- ASCAP's fees for the music
7 service industry were the product of good faith
8 negotiations conducted at arms length by sophisticated
9 business people.

10 "ASCAP further asserts that fees to which
11 the parties agreed for a decade cannot suddenly become
12 unreasonable, and accordingly ASCAP urges this Court
13 to apply the presumption in favor of the
14 reasonableness of their prior agreement."

15 Is that an accurate summary of ASCAP's
16 position at the interim fee stage of that proceeding?

17 A That sounds right. I don't remember the
18 decision. Of course, the interim fee stages of those
19 proceedings are vastly different than the final fee
20 stages. All we're saying is this -- the customer
21 should continue to make an on account payment while
22 the license -- the ultimate license is either being

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1 negotiated or adjudicated, and the best measure is the
2 status quo.

3 All of those changes can be undone, should
4 that be necessary, at the end. In fact, in that case,
5 we reached agreement; that never went to trial, if I
6 recall correctly.

7 Q Was the position, I just quoted Judge
8 Conner as articulating vastly different from all of
9 the other Rate Court positions ASCAP has taken?

10 A I think the interim fee proceedings are
11 vastly different than final fee proceedings, and there
12 is a totally different standard for setting those
13 fees. They are just different types of fees, because
14 they are on -- they are essentially on account
15 payments a month.

16 Q My question was a little different. Was
17 the position articulated by ASCAP and you helping
18 formulate as its chief economist, at the interim fee
19 phase that I just quoted from, was it substantially
20 different from the positions ASCAP has taken in other
21 Rate Court proceedings?

22 A No, not in other proceedings. I think we

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1 were taking a very different position for final fees
2 in that proceeding, however.

3 Q Namely, that the preexisting license
4 agreement should stay in place on an interim basis?

5 A It should be on an interim basis, but I
6 think the final fees we were requesting were a totally
7 different formula in that case. But it ultimately
8 never went to trial. I think the proposal for final
9 fees was going to be a vastly different formula.

10 MR. RICH: At this point, with the Panel's
11 permission, I'd like to offer in evidence a copy of
12 Judge Conner's June 10, 1992, opinion in the Muzak
13 Limited Partnership proceeding, which would be 22X.

14 CHAIRPERSON GRIFFITH: Mr. Shore, any
15 objection?

16 MR. SHORE: No.

17 CHAIRPERSON GRIFFITH: Mr. Kleinberg, any
18 objection, sir?

19 MR. KLEINBERG: No.

20 CHAIRPERSON GRIFFITH: It will be marked
21 and received as PB -- what number?

22 MR. RICH: 22X.

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1 CHAIRPERSON GRIFFITH: 22X.

2 (Whereupon, the above-referred
3 to document was marked as PB
4 Exhibit No. 22X for
5 identification, and was
6 received into evidence.)

7 MR. RICH: Thank you. My colleagues tell
8 me that I misspoke in identifying the exhibit number
9 of the ABC/CBS opinion. It apparently is ASCAP
10 Exhibit 20, as opposed to PB 4X. I apologize. PB 4X
11 is a different agreement -- a different --

12 CHAIRPERSON GRIFFITH: 20 --

13 MR. SCHAEFFER: No. It's an ASCAP
14 exhibit, Your Honor.

15 CHAIRPERSON GRIFFITH: Oh, it's ASCAP.
16 Okay.

17 BY MR. RICH:

18 Q Dr. Boyle, I just want to go over some of
19 your responsibilities as chief economist, as you've
20 testified. As ASCAP's chief economist, your duties
21 embrace determining the appropriate fees for licensing
22 ASCAP's repertory, correct?

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1 A That's right. I work with my colleagues
2 on that. That's right.

3 Q And as well, over the past 12 or so years,
4 entailed being actively involved in preparing license
5 fee proposals that ASCAP has made, including public
6 broadcasting?

7 A Yes.

8 Q And entails preparing economic and
9 statistical analyses to support these proposals?

10 A Yes.

11 Q And entails preparing economic evaluations
12 of counterproposals by licensees?

13 A Yes.

14 Q And you take these responsibilities
15 seriously, I assume?

16 A Absolutely.

17 Q And you do your best to discharge them,
18 yes?

19 A Yes.

20 Q And they are part of your and management's
21 fiduciary obligation to ASCAP's members, that they be
22 seriously discharged, correct?

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1 A Yes.

2 Q Did you perform each of these foregoing
3 functions in connection with 1992 negotiations with
4 public broadcasting?

5 A Yes.

6 Q Same question as to the 1987 negotiations.

7 A Yes.

8 Q Now, in your oral testimony given to Mr.
9 Shore, you indicated with what sounded like regret --
10 I think the word you used was "unfortunately" -- that
11 you can't use the prior ASCAP agreements for public
12 broadcasting because of the legal language you cited,
13 correct?

14 A That's right. Because both sides --

15 Q Now, do you have your written testimony
16 handy?

17 A I'm sorry. I wasn't finished. I wasn't
18 finished with the answer. That's right. Because both
19 sides -- we and the public broadcasting stations --
20 agreed that we would not use it. That was part of the
21 deal we struck. That was one of the terms, along with
22 everything else in that license, that we agreed to.

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1 Q Do you have your written testimony handy?

2 A Yes.

3 Q Please turn to paragraph 5. Do you have
4 it?

5 A Yes.

6 Q First sentence, "Upon my review of certain
7 financial and operational information addressed in
8 ASCAP's current submission to this Panel, from an
9 economist's perspective, the current annual fee paid
10 by Public Broadcasters is not in any way indicative of
11 the value that such entities are receiving from their
12 public performance of music from the ASCAP repertory."
13 Do you see that?

14 A Yes.

15 Q Now, where in your written testimony did
16 you say, "I can't discuss this from a legal
17 standpoint," as opposed to from an economist's
18 standpoint? I have read your testimony a number of
19 times. I don't see it. Did I miss it?

20 A Well, it's a combination of the two. The
21 comparisons to the network, the background for the
22 proposal I put forward here suggests the fees should

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1 be much, much higher than the public broadcasting
2 stations have been paying in the past. That the prior
3 deals aren't indicative of value they receive. And,
4 furthermore, that's explicitly expressed in those
5 agreements because they are non-precedential and not
6 recited. That was part of the term, so it's a
7 combination of the two.

8 Q So you do have an opinion, then, as an
9 economist as opposed to as someone who is a client of
10 a lawyer, as to the --

11 MR. SCHAEFFER: I object, Your Honor.

12 BY MR. RICH:

13 Q -- as to the --

14 CHAIRPERSON GRIFFITH: Let him finish.

15 BY MR. RICH:

16 Q -- as to the probative value of the prior
17 license agreements entered into between ASCAP and
18 public broadcasting?

19 CHAIRPERSON GRIFFITH: All right. Just a
20 moment.

21 Mr. Schaeffer?

22 MR. SCHAEFFER: I object to that kind of

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1 insinuation. He's putting words in his mouth. There
2 is no predicate for that. We've conducted this --

3 CHAIRPERSON GRIFFITH: He's going to
4 rephrase the question.

5 MR. RICH: There was no pejorative
6 intended.

7 MR. SCHAEFFER: Well, then, don't do it.

8 BY MR. RICH:

9 Q Dr. Boyle, I take it in paragraph 5 of
10 your written testimony you purport, as an economist,
11 to find reasons that the prior license agreements
12 between ASCAP and public broadcasting are not
13 probative of the reasonable fee here, correct?

14 A What I'm saying is that when you do this
15 type of analysis, it indicates the fee should be
16 substantially higher than they were paying in the
17 past. We agreed to those deals. Those are deals for
18 the past. The economic evidence suggests the fee
19 should be substantially higher than the value that are
20 shown in those fees, that are shown in those
21 agreements.

22 Q And by the "economic evidence," you are

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1 referring to what covers both sides of that blackboard
2 and a number of sheets here that you reviewed on your
3 direct testimony?

4 A That's right. And the -- which is really
5 in the direct testimony, the written statement itself.
6 That's right.

7 Q So that as an economic matter, separate
8 and apart from legal considerations, you have
9 proffered testimony here purporting to talk about the
10 reasonableness or lack of reasonableness of ASCAP's
11 prior relationship with public broadcasting, is that
12 -- am I correct? That's what paragraph 5 says, right?

13 A Paragraph 5 says -- and what I've tried to
14 just explain -- is that when you look at the
15 economics, it seems that the fee should be
16 substantially higher. And you can't rely on those
17 agreements because part of the bargain was we wouldn't
18 rely on those agreements.

19 Q So --

20 A I don't see how the two are -- that's all
21 part of this testimony.

22 Q I have no problem with your testimony, but

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1 your testimony did go forward and make assertions as
2 to the probative value of the prior license agreement,
3 based on your views as an economist of what factors
4 should be looked at, correct? That's paragraph 5,
5 first sentence, true?

6 A I'm sorry. I don't -- I don't know how to
7 answer the question. I mean --

8 JUDGE GULIN: Maybe I can --

9 THE WITNESS: -- any other than I just
10 have.

11 JUDGE GULIN: Let me try asking it a
12 different way.

13 If you are not legally precluded in your
14 mind from using the 1992 agreement as a basis for your
15 analysis, assuming that, would you use the 1992
16 agreement as a starting point for your analysis? And
17 if not, why not?

18 THE WITNESS: See, I've got -- the big
19 problem I have with that is I don't think you can
20 separate out the various terms. Part of the reason we
21 agreed to the fees we agreed to was that part of the
22 deal was that these were explicitly non-precedential

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1 fees. I'm not sure we would have agreed to anything
2 like that level had that not been in there.

3 You know, one of the things -- one of the
4 starting points with all of the negotiations typically
5 -- kind of catch phrase with the industries is, "We
6 don't have an agreement on anything until we've got an
7 agreement on everything."

8 The whole -- while we may say this fee
9 level looks fine, or this provision looks fine, until
10 you've got the whole package agreed upon you don't
11 really have agreement on anything. And that was part
12 of the package. I mean, we -- you know, we agreed to
13 those terms, and we were willing to take those fees on
14 the condition that they were non-precedential.

15 You also have to remember, in 1992, we are
16 in a different world. We couldn't have really done
17 this analysis because we didn't have final fees with
18 the local television broadcasters or the network
19 television broadcasters at that time. We were in the
20 middle of intense litigation with both of those, so we
21 didn't have this kind of benchmark, even if we wanted
22 to -- to go to a proceeding of that type.

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1 So that was all part of what led to that
2 agreement, and I don't see how you can divorce them at
3 that --

4 JUDGE GULIN: What you're saying is in
5 1992 you didn't realize that you were being underpaid?

6 THE WITNESS: No. I think we are saying,
7 really, that as long as it was explicitly non-
8 precedential, that was something we could agree to,
9 because we didn't have this option to fall back on and
10 litigation. At that time, we were in the middle of
11 two big rate proceedings. It would have been
12 complicated, or it would have been expensive, and it
13 would have diverted resources from some other major
14 fight.

15 So that was all part of the agreement was
16 that they were non-precedential and wouldn't be cited
17 in future negotiations. And I don't see -- I don't
18 see I'm going to be able to negotiate -- be part of
19 the negotiating team with other customers in the
20 future if those kind of provisions, when we've agreed
21 to them, we don't -- we don't abide by them, because
22 it's -- you're never going to be --

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1 JUDGE GULIN: I understand that. But I'm
2 asking you --

3 THE WITNESS: It's going to make --

4 JUDGE GULIN: -- to put that aside, and
5 assume hypothetically -- I'm asking you to assume
6 hypothetically that those provisions did not exist in
7 the agreement.

8 THE WITNESS: It's -- I guess the best
9 answer I can give in that kind of speculative
10 situation is I'm not sure we would have agreed to
11 those fees at all, and we wouldn't have -- we wouldn't
12 have had another proceeding on our hands at that point
13 in time.

14 That's a little hard to do with hindsight,
15 but that's -- there was sentiment at that time that
16 the fees were too low, but there was also sentiment
17 given -- the fact that we had local and network TV in
18 litigation and we didn't have another bench mark to
19 fall back on, that the proceeding wasn't --

20 MR. RICH: Could you speak up a bit?

21 JUDGE GULIN: Keep up your voice.

22 THE WITNESS: I'm sorry, there was --

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1 JUDGE GULIN: You need to slow down a
2 little bit too.

3 THE WITNESS: There were two things
4 though. And I think there was some sentiment that
5 those fees at that time were low. But there was also
6 recognition that we didn't have final negotiated or
7 litigated bench marks with the commercial broadcasters
8 either.

9 So that going to another proceeding at the
10 same time would have been extremely difficult, and
11 that was all part of the negotiation. All of those
12 terms were interwoven and part of the deal that was
13 struck.

14 BY MR. RICH:

15 Q Is it your position, Dr. Boyle, in this
16 proceeding, that the fact that an agreement may be
17 labeled non-precedential by definition means that the
18 terms agreed to are not reasonable?

19 A I'd have to think about that one.

20 Q We have time.

21 A I'm not so -- I guess the answer is I'm
22 not sure, but it's -- you know, it was clear in this

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1 case that we agreed not only they were non-
2 precedential, but they wouldn't be cited in future
3 proceedings or negotiations.

4 That's a strong provision. I don't know
5 how to do anything else but say that's what we agreed
6 to.

7 Q Well, perhaps you can answer this
8 different question, which is, understanding your
9 testimony that you can't or won't look at your own
10 agreements in this industry, your proposal then moves
11 over to the commercial broadcasting industry to
12 generate all of the modeling, correct?

13 A Yes.

14 Q Did you consider, but reject, looking at
15 the fees that BMI paid as a possible measure of
16 reasonable license fees to ASCAP?

17 A I have no idea what those fees were.

18 Q As an economist, do you believe that,
19 assuming those fees are available to this Panel, those
20 would provide probative evidence of a reasonable fee
21 for ASCAP adjusted as appropriate for such things as
22 music share differences?

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1 A Without knowing the --

2 JUDGE GULIN: You can also assume for that
3 question that there were no similar provisions in that
4 --

5 MR. RICH: Thank you very much, Judge
6 Gulin; correct.

7 THE WITNESS: I guess without knowing
8 anything about the results or the background or how
9 the negotiations took place or anything, it's a little
10 hard to answer. I would rarely say that anything
11 should be excluded entirely.

12 I think it's far better to take a look at
13 how other customers in the same or similar industries
14 have negotiated with ASCAP and used the ASCAP
15 repertory rather than going to BMI because you have a
16 history of negotiations for the exact same repertory.

17 I think that's a better measure. But, you
18 know, knowing nothing about the BMI agreements, it's
19 a little hard for me to answer that.

20 BY MR. RICH:

21 Q Indeed, didn't Magistrate Judge Dolinger
22 look just to such agreements in the absence of

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1 reliable early start up Showtime and The Movie Channel
2 agreements from an experimental era -- didn't he, in
3 the absence of that, look right in his own backyard,
4 so to speak, at Showtime and The Movie Channel's
5 agreements with your competitor, BMI, as a bench mark
6 for fee setting?

7 A I believe he did.

8 Q And he found that, amongst all of the
9 other bench marks, the best one, at least on the fact
10 record there presented, didn't he?

11 A Again, I don't remember all the in's and
12 all the details of his decision exactly, but that was
13 certainly an important consideration for him. I think
14 there were some others as well, but that was an
15 important consideration.

16 Q If this Panel were to find the BMI license
17 agreements -- and I understand that you're not
18 familiar with their terms -- probative, what factors
19 should they consider in evaluating the degree to which
20 the fees public broadcasting paid to BMI should be
21 altered in terms of the fees that public broadcasting
22 should pay ASCAP?

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1 A Oh, I think they would certainly have to
2 take a look at relative music use. They'd probably
3 have to take a look at the fee structures in other
4 industries; other customers such as the commercial and
5 network broadcasters, what they paid ASCAP, what they
6 pay to BMI.

7 I think you have to take a look at the
8 nature of the public broadcasting industry itself.
9 One significant thing is that, since 1978, the public
10 broadcasting industry has changed dramatically, and
11 that's one of the reasons we think a bench mark like
12 commercial television is more appropriate given the
13 growth in public broadcasting and given the increase
14 in its private revenue sources as opposed to public
15 funding.

16 All of those things would have to go into
17 the mix. I think it's certainly going to make the
18 analysis a lot more complicated rather than looking at
19 what other customers have agreed to pay ASCAP for the
20 use of the same repertory, but you'd have to take all
21 of those things into consideration -- payments to
22 ASCAP, payments to BMI, music use of ASCAP, music use

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1 of BMI, changes in the public broadcasting economics
2 over that time period and probably other things that
3 aren't jumping to mind immediately as well.

4 Q You don't --

5 A So I guess you'd also have to take a look
6 -- you might have to take a look at the context in
7 which those agreements were reached, what was going on
8 at the bargaining table at that time, whether they
9 were really arms length negotiations.

10 You know, I can't comment on any of those
11 things.

12 Q You don't assert it would be irrelevant
13 for this Panel to examine the prior BMI relationships
14 of public broadcasting culminating in a series of
15 prior agreements, do you?

16 A I don't know if there's any provisions in
17 the agreements that would make them so. It might not
18 be irrelevant. I think they might have some --
19 difficult for me to at least decide or assign what
20 kind of weight should be given to those agreements.

21 I think the ASCAP agreements with other
22 customers are a far better measure.

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1 Q If you were not barred by concerns of
2 perhaps confidentiality or legalisms, would that have
3 been information you would have asked your counsel to
4 provide you with in formulating a fee proposal for
5 this Panel?

6 A I don't think I could have. As far as I
7 know, the prior BMI agreements have always been filed
8 with the payments terms explicitly omitted, and that
9 they were not publicly available.

10 There's no -- as far as I know -- you
11 know, the lawyers know far better than me. I don't
12 think you have the same kind of discovery situation,
13 so I'm not sure how they'd even have access to that
14 information.

15 MR. RICH: We're going to move to, I
16 guess, something that might require a confidential
17 record at this point. And I don't know if the Panel
18 wants me to just keep going, which I'm happy to, or
19 take a short afternoon break?

20 CHAIRPERSON GRIFFITH: We'll take our
21 afternoon recess at this time.

22 (Whereupon, the foregoing matter went off

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1 the record at 3:39 p.m. and went back on
2 the record at 3:54 p.m.)

3 MR. RICH: For the Panel's information,
4 I'm going to be asking the witness some questions
5 about aspects of prior negotiations. So, to the
6 extent there may be confidential to ASCAP information,
7 I assume everybody who should be here is, and
8 everybody who shouldn't be --

9 CHAIRPERSON GRIFFITH: All right, for the
10 record, we are -- we have not been in executive
11 session. Anyone not covered by the order should be
12 excused from the room -- protective order, that is.

13 Okay.

14 MR. SHORE: I'd also just like to
15 supplement the agreement about discussing this is that
16 we've all agreed that, to the extent questions are
17 asked, they are not going to the various figures that
18 were floated back and forth during the settlement
19 discussions.

20 We've all agreed that those would be
21 confidential.

22 CROSS EXAMINATION (continued)

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1 BY MR. RICH:

2 Q Dr. Boyle, who were ASCAP's chief
3 negotiators in the 1987 and 1992 negotiations with
4 public television?

5 A As I recall, I believe Mr. Korman --
6 Bernard Korman, who was then ASCAP's general counsel,
7 was one of the chief negotiators. I believe Ms.
8 Gloria Messinger was involved. I was involved in
9 those negotiations.

10 I believe a gentleman named Barry Knittel,
11 K-n-i-t-t-e-l, who was, at that time, director of
12 licensing at ASCAP, was involved in at least one of
13 those rounds of negotiations. I'm not so sure about
14 the 1987 round.

15 I think Fred Koenigsberg, K-o-e-n-i-g-s-b-
16 e-r-g, as outside counsel, was involved with one and
17 possibly both of those rounds. I believe one of the
18 attorneys at ASCAP, Bennett Lincoff, was involved in
19 the last round of negotiations.

20 And there may have been some other people
21 as well. Those are the ones that immediately come to
22 mind.

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1 Q Was Mr. Korman a member of the senior
2 management team at ASCAP?

3 A Yes, he was.

4 Q Was Ms. Messinger?

5 A Yes.

6 Q Were you?

7 A Yes.

8 Q Was Mr. Knittel?

9 A Depends on the time period. I think in
10 1992 he was. I'm not so sure about 1987.

11 Q What title did he carry again?

12 A At one point he was director of licensing.
13 He had overall responsibility for all licensing
14 matters. Prior to that, he was in charge of our non-
15 broadcasting or what was referred to as general
16 licensing operation.

17 Q And Mr. Koenigsberg still has an
18 association with ASCAP, does he not?

19 A Yes, Mr. Koenigsberg is counsel to ASCAP's
20 board of directors.

21 Q You would agree that was a rather senior
22 team who participated in the '87 and '92 negotiations,

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1 yes?

2 A Yes.

3 Q Signifying that these were relatively
4 important negotiations, true?

5 A True.

6 Q I take it that group, or a significant
7 component of that group, does not show up at all of
8 ASCAP's negotiations with all manner of users?

9 A They would have -- they probably -- those
10 folks would have probably been involved in virtually
11 all the broadcasting negotiations with our customers.
12 Mr. Knittel probably would have been involved in
13 virtually all the negotiations.

14 I would have been in a fair amount of
15 them. It's going to vary a little bit from industry
16 to industry; but certainly for the broadcasting, you
17 probably have pretty much the same people.

18 Q Now in connection with either the 1987 or
19 the 1992 negotiations, did any of ASCAP's other senior
20 managers -- Mr. Korman, Ms. Messinger, Mr. Knittel as
21 director of licensing for the appropriate period, or
22 anyone else at ASCAP -- ask you, as ASCAP's chief

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1 economist, to prepare a proposal in connection with
2 the forthcoming negotiations that was unreasonably low
3 from ASCAP's standpoint?

4 MR. SCHAEFFER: I'm ready to object. Or
5 he was the general counsel of ASCAP. He was acting as
6 general counsel. I don't think there's any dispute
7 about that -- or he was internal general counsel.

8 What his communications instructions were
9 to a member of ASCAP, senior management or otherwise,
10 as how to go ahead with the negotiations and their
11 preparation is clearly confidential communications.

12 And I don't think they should be exposed
13 even in an arbitration. How you prepare for a
14 negotiation seems to be the most confidential of all
15 communications.

16 MR. RICH: Your Honor, our confidential
17 record -- Your Honor, point one, point two, I don't
18 know that Mr. Boyle reported to Mr. Korman. I'm happy
19 to establish their relationship if you'd like.

20 CHAIRPERSON GRIFFITH: All right.

21 MR. RICH: Point three, it's directly
22 relevant because he's proffered in his written

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1 testimony and oral testimony that one of his key
2 functions at ASCAP was to prepare licensing proposals
3 in anticipating of negotiations.

4 MR. SCHAEFFER: That happens all the time
5 in court. I mean, a confidential communication --
6 just because the party gets confidential
7 communications involving the corporation's affairs
8 doesn't bar him from testifying.

9 It's the communications and how they do it
10 that's the exact point of the privilege.

11 CHAIRPERSON GRIFFITH: All right.

12 JUDGE DREYFUS: Is the objection based on
13 attorney-client privilege?

14 MR. SCHAEFFER: And on work product.
15 There is some anticipation of litigation; but
16 primarily, sure, upon communication between a
17 corporate officer and a general counsel as to what
18 they were going to do.

19 That seems to be clearly -- unless it's
20 established that it wasn't -- those communications
21 weren't intended to be confidential, which it
22 certainly hasn't been, it seems to me clearly those

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1 are confidential communications under Federal --

2 JUDGE DREYFUS: And to comment on
3 attorney-client privilege?

4 MR. RICH: Is an assumption, first of all,
5 and maybe I could lay a foundation by asking him.

6 CHAIRPERSON GRIFFITH: That's what we want
7 to hear.

8 BY MR. RICH:

9 Q Who was your boss in 1987, Dr. Boyle?

10 A I suppose it depends on what areas we were
11 dealing with. Gloria Messinger, as managing director,
12 was ultimately responsible for my performance
13 appraisals and that type of review.

14 And negotiation, rate proceeding
15 litigation matters, essentially Mr. Korman, as
16 counsel, was responsible for the various people that
17 would have dealt with him on those issues.

18 Q Did you regard yourself as not having any
19 boss, technically speaking?

20 A No, I regarded myself as reporting to Ms.
21 Messinger. And I suppose an organization chart, if we
22 would draw one, that it wasn't one that existed. It

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1 would have been a dotted type line reporting to Mr.
2 Korman particularly on matters relating to
3 negotiations and litigations.

4 Q And as of 1992, to whom did you report?

5 A The same situation.

6 MR. SCHAEFFER: Just -- I interject. I
7 don't think it's who he reports to in the chain of
8 command. The question is whether his services, which
9 is what I think Mr. Rich should go into -- whether his
10 services were solicited in connection with the
11 negotiations by Korman.

12 MR. RICH: Perhaps I can rephrase the
13 question and see if we can avoid this.

14 CHAIRPERSON GRIFFITH: All right.

15 MR. RICH: I think we may not be able to,
16 however.

17 BY MR. RICH:

18 Q Did you, in fact, prepare one or more
19 proposals in connection with the 1987 public
20 broadcasting negotiations?

21 A I did.

22 And when I say "I," I don't mean by

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1 myself. In working with my colleagues, I would have
2 prepared a proposal.

3 Q And did you in fact prepare proposals that
4 you, as ASCAP's chief economist, regarded to be
5 unreasonably low?

6 MR. SCHAEFFER: I would object to the form
7 of the question. The reason I'm objecting -- it's
8 like how many times did you beat your wife.

9 JUDGE DREYFUS: No, that wasn't a negative
10 threat.

11 MR. SCHAEFFER: A negative threat is a
12 negative threat. How many times you beat your wife
13 isn't the negative threat. The point is, it assumes
14 you beat your wife in the first place or assumes there
15 was an unreasonably low --

16 MR. RICH: Your Honors, we have a very
17 sophisticated witness who has done so many of these.
18 I don't think he needs this coaching from his counsel,
19 with all respect.

20 MR. SCHAEFFER: I object to that, but why
21 don't you ask him a direct question instead of such a
22 loaded question.

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1 CHAIRPERSON GRIFFITH: The objection is
2 overruled.

3 BY MR. RICH:

4 Q Please answer.

5 A What was the question?

6 Q The question is, the proposal or proposals
7 you prepared in 1987, did you regard them as being
8 unreasonably low from ASCAP's perspective?

9 A No.

10 Q And one or more were presented, I take it,
11 to the public broadcasters?

12 A That's correct.

13 Q And there were fairly intensive series of
14 negotiations which occurred in the period of June
15 through September of 1987, were there not?

16 A Yes.

17 Q And am I correct that the preexisting
18 license agreement between the public broadcasters and
19 ASCAP that is covering the period of 1983 through 1987
20 totaled \$11.5 million dollars over five years?

21 A I'm sorry, that was for the period --

22 Q 1983 through 1987.

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1 A I don't recall precisely.

2 Q I'll represent to you my best knowledge of
3 those.

4 A I don't remember.

5 Q Okay. Do you recall Mr. Korman advising
6 the public broadcasters in one or more meetings during
7 1987 that ASCAP was not looking to radically depart
8 from the prior fee levels agreed to?

9 A I don't recall that comment, no.

10 Q How many meetings in 1987 do you remember
11 being present for?

12 A I think I was present at most, if not all
13 of them.

14 Q Do you typically take notes at these
15 meetings?

16 A It varies from meeting to meeting. I'm
17 not sure about typically, but sometimes.

18 Q Did you in fact take meetings at some or
19 all of these 1987 negotiations?

20 A I don't recall.

21 Q Did you take notes at every one of these
22 meetings?

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1 A I don't recall. I haven't reviewed them
2 if I did.

3 Q Did you have occasion to review any notes,
4 whether prepared by you or any of the other attendees
5 at any of these meetings, in preparation for your
6 testimony here?

7 A No.

8 Q You didn't seek out any such notes?

9 A No.

10 Q You didn't seek to refresh yourself as to
11 the details of those prior negotiations?

12 A I didn't review any of the notes or seek
13 them out, no.

14 JUDGE GULIN: Keep your voice up, please.

15 BY MR. RICH:

16 Q And that -- and the same would be true as
17 to the 1992 negotiations?

18 A Yes.

19 Q Did you participate in person in those --
20 directly in those?

21 A In most of the sessions. I don't remember
22 if I attended every one.

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1 Q Now, in fact, am I correct that the 1987
2 negotiations culminated in a five year agreement
3 calling for the payment of \$13 million dollars -- that
4 is, \$2.6 million dollars a year?

5 A Yes, I believe so.

6 Q Which represented an increase of 13% over
7 the prior license period?

8 A Don't recall that part of it.

9 Q Do you recall Mr. Koenigsberg, in October
10 of 1987, standing up before the CRT and expressing
11 ASCAP's delight at having reached negotiated terms
12 with the public broadcasters?

13 A No.

14 Q Let me show you a document that I'm going
15 to ask to be identified as PB 23X. And this is a
16 transcript of a hearing that occurred on October 8th
17 of 1987. I'm going to ask you to flip to the sixth
18 and seventh pages of this document.

19 (Whereupon, the above-mentioned
20 document was marked as PB
21 Exhibit 23X for
22 identification.)

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1 JUDGE GULIN: Are you going to have this
2 admitted?

3 MR. RICH: Please, as --

4 CHAIRPERSON GRIFFITH: 23X.

5 MR. RICH: -- 23X.

6 BY MR. RICH:

7 Q If it's the same page I'm on, Dr. Boyle,
8 it starts with a comment from Chairman -- and I can't
9 pronounce his name -- Argetsinger, "Thank you very
10 much, Mr. Pappas." Do you see the page beginning with
11 that at the top?

12 A I think we're in the same place.

13 Q Okay. And if you course down to comments
14 from Mr. Koenigsberg -- what was Mr. Koenigsberg's
15 position at ASCAP in 1987?

16 A He was either an attorney on ASCAP's staff
17 at that point or he was outside counsel. I don't
18 recall precisely.

19 Q Was one of his areas of specialization the
20 CRT?

21 A Yes.

22 Q Matters relating to the CRT?

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1 A Yes.

2 Q So it was appropriate that he speak in
3 ASCAP's behalf in matters dealing with the status of
4 license relationships between ASCAP and various
5 licensees affected by compulsory licensing?

6 A Yes.

7 Q Okay. Do you recall being advised by Mr.
8 Koenigsberg or ever seeing what is reported here in
9 the transcript at the middle of the sixth page where
10 Mr. Koenigsberg says, "We are most happy to tell you,
11 Mr. Chairman, that ASCAP, PBS and NPR have reached a
12 voluntary agreement covering the next five years."

13 "It covers PBS and its member stations,
14 NPR and its member stations, and certain other CPB
15 qualified noncommercial educational radio broadcasting
16 stations. Our agreement is full and complete on its
17 face."

18 It goes on to say it will be filed. And
19 then down at the bottom of the page, "You know, Mr.
20 Chairman, the first time the Tribunal held proceedings
21 in this matter back in 1978, we had to go to full
22 hearings and a decision on the license fee for ASCAP

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1 music to be used by PBS and NPR."

2 "The last time around, in 1982, we were
3 able to make a voluntary agreement. This time around,
4 again, we were able to make a voluntary agreement, and
5 we are just delighted that we are able to do so and
6 are hopeful that that is a sign for the future as
7 well."

8 Have you ever seen that before?

9 A No.

10 MR. RICH: I would offer this document in
11 evidence at this point.

12 MR. SCHAEFFER: No objection.

13 MR. SHORE: Is it just the full record of
14 the hearing? That would be my only question.

15 MR. RICH: It is.

16 MR. KLEINBERG: No objection.

17 CHAIRPERSON GRIFFITH: All right, and that
18 will be received without objection, PB Exhibit 23X.

19 (Whereupon, the above-mentioned
20 document, previously marked as
21 PB Exhibit 23X for
22 identification, was received in

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1 evidence.)

2 BY MR. RICH:

3 Q Prior to the 1987 agreement being inked
4 between the parties, that calling for a 13% increase
5 over the prior period, do you recall advising any
6 members of senior management against entering into
7 this agreement? And I'll ask you to exclude any
8 attorney-client privilege communications here.

9 But, for example, do you recall advising
10 Ms. Messinger that, as ASCAP's chief economist, you
11 felt this was a bad deal for ASCAP?

12 A As I recall at that time, all of those
13 discussions were held not only with Ms. Messinger but
14 also with Mr. Korman as counsel, and all of my work
15 was done at his request. So I'm not sure I can remove
16 his presence. It was all part of the group working
17 together that led to this agreement.

18 Q Was there a law and licensing committee at
19 ASCAP at that period of time?

20 A A member of the -- a committee of the
21 board of directors, yes.

22 Q Was it required that agreements of this

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1 type be submitted to that committee for approval?

2 A I don't recall.

3 Q Do you recall whether in fact the 1987
4 agreement was submitted to that committee for
5 approval?

6 A No, I don't recall.

7 Q Did this agreement require a board
8 approval?

9 A I don't remember. I'm sure we reported it
10 to the board. Whether there was required approval or
11 not, I don't recall.

12 Q Do you recall anyone reporting it to the
13 board with a negative recommendation?

14 A No, I don't recall that.

15 Q And you also participated, I think you --
16 oh, one other question.

17 How many conversations do you recall in
18 the 1987 negotiations dealing with the no precedent
19 clause of the agreement?

20 A I don't know precisely. Several.

21 Q Several?

22 What is your best recollection of the

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1 substance of those conversations?

2 A That they were internal discussions and
3 were part of our consideration as to whether to accept
4 the terms of that agreement.

5 Q My question wasn't clear. I apologize.

6 How many conversations across the table
7 with representatives of public broadcasting involved
8 that issue in 1987?

9 A I don't recall any at the bargaining
10 table. I think that was dealt with between counsel
11 for both sides.

12 Q You think or you're speculating?

13 A I believe it was dealt with between
14 counsel.

15 Q By "dealt with," meaning in the paperwork
16 memorializing the event?

17 A And whatever discussions counsel had.

18 Q Are you aware of whether there were any
19 substantive discussions of this provision between
20 anyone from ASCAP and anyone from public broadcasting
21 in connection with the 1987 negotiations?

22 A I believe Mr. Korman said he was -- that

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1 was part of the terms of the license that he was
2 discussing with his counterpart in -- when the license
3 was being prepared with counsel.

4 Q This was a statement Mr. Korman made
5 personally to you?

6 A I believe so.

7 Q When and where?

8 A I don't remember precisely where or when.
9 It was around the time when the agreement was being
10 discussed, as I recall.

11 Q And did he indicate to you that this was
12 a source of disputation between the parties that
13 required a conversation?

14 A He didn't indicate -- no, I don't recall
15 indicating a dispute; just that it was discussed.

16 Q Is this a telephone conversation with him?

17 A With me?

18 Q And Mr. Korman.

19 A I don't recall. Probably not. Probably
20 on the office, I guess.

21 Q And what else do you remember about that
22 conversation, about the details of what was being

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1 discussed with representatives of public broadcasters?

2 A Just generally the terms of the license
3 agreement and that it -- that the terms were begin
4 finalized.

5 MR. SCHAEFFER: Just for the record, I
6 think it appropriate for the Panel, since there was a
7 reading, and not a complete reading of the document,
8 I would suggest that there is -- although, this
9 doesn't seem to have any pages on it -- a very, very
10 extended discussion by Mr. Koenigsberg of the fact
11 that the various agreements were non-prejudicial and
12 not to be used as precedent for the Copyright Royalty
13 Tribunal.

14 JUDGE GULIN: Does that matter for --

15 MR. SCHAEFFER: I don't think so. Because
16 I think when -- all right, we have had a disagreement
17 on that. I don't believe so. Really, when a document
18 that's proffered is not completed, it's appropriate to
19 point out the balance when it is not complete.

20 BY MR. RICH:

21 Q What individual or individuals did Mr.
22 Korman identify to you that he had been discussing the

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1 subject of the non-precedent language with on the
2 public broadcasting side?

3 A I don't recall. I don't recall who was
4 acting as counsel for the various parties at that
5 point.

6 Q Now the 1992 negotiations in which you
7 also participated also were arms length and resulted
8 in an agreement acceptable to both sides, correct?

9 A Yes.

10 Q And again, Dr. Boyle, do you recall
11 advising anyone in ASCAP's management or its licensing
12 committee or its board against entering into the
13 agreement which was reached in 1992 on the grounds
14 that it was not indicative of the value of ASCAP's
15 repertory of public broadcasters?

16 A As I recall the discussions, it was that
17 those fees were acceptable given the entire terms of
18 the agreement, including the non-precedential clause.
19 And that is all part of the terms of the agreement.

20 Q And by acceptable, you mean you didn't get
21 everything you wanted and presumably the public
22 broadcasters didn't get everything they wanted,

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1 correct?

2 A That's right, and that those fees couldn't
3 be used in future proceedings.

4 Q And this agreement called for a five year
5 fee totalling \$14.95 million dollars, correct?

6 A I believe so.

7 Q Representing an increase, by my math, over
8 the prior term of about 10.7%, correct?

9 A That sounds about right. I haven't done
10 the math.

11 Q How many times at the bargaining table
12 during the 1992 negotiations was the subject of the no
13 precedent clause discussed with representatives of
14 public broadcasting?

15 A I don't recall that it was discussed at
16 the bargaining table. At least at the sessions I
17 attended.

18 Q Let's talk about your current fee
19 proposal, the one you outlined for the Panel earlier.
20 And I take it in your final revised testimony, you
21 seek a total of \$7,982,000 from public broadcasting
22 for each year during 1998 to 2002, is that correct?

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1 A Yes.

2 Q That number over there?

3 A Yes.

4 Q All right.

5 And that represents an additional
6 \$4,992,000 per year over the 1993 through 1997 fee
7 level of \$2,990,000 per year, correct?

8 A Yes, that sounds right.

9 Q So it's about two and a half times --
10 actually more than two and a half times the level of
11 the most recent license fees, correct?

12 A Yes.

13 Q And the radio component, I take it, as is
14 up on the board here, is \$3,370,000, correct?

15 A Yes.

16 Q And so the radio component of ASCAP's
17 proposed fee in this proceeding exceeds the total
18 license fee for radio and television combined under
19 the prior license, is that correct?

20 A Yes.

21 Q Now again, back to paragraph five of your
22 testimony, you state that public broadcasters

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1 apparently operate in a fashion substantially
2 comparable with commercial broadcasters in the United
3 States.

4 Is that a correct statement from your
5 testimony?

6 A Yes.

7 Q And I take it -- let me ask you, is this
8 your view even though commercial broadcasters operate
9 in a for profit mode and noncommercial broadcasters
10 operate, by definition, in a not for profit mode;
11 nonetheless, they are substantially comparable?

12 Paragraph five.

13 A In terms of -- I also mention in that
14 paragraph that says "exception discussed below," which
15 is discussed at paragraph ten on pages four and five.

16 Particularly at the top of page five, it
17 says, "As mentioned above, from a licensing
18 perspective, there is a major difference between
19 commercial and public broadcasting's revenue base."

20 The difference between public
21 broadcasting's receipt of funds from tax base sources
22 such as federal, state and local governments and

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1 funding from public and publicly funded colleges and
2 universities," and go on further discussions about
3 that distinction.

4 Q Yes, but, for the moment, how relevant in
5 your estimation in assessing comparability is the fact
6 that the commercial broadcasters operate for profit
7 and to maximize shareholder value on the one hand, and
8 not for profit broadcasting operates under 47 USC 396
9 -- I'm not asking you to memorize it, but that's the
10 Public Broadcasting Act -- with the purpose of serving
11 the public interest "for instructional, educational
12 and cultural purposes?"

13 Do you see, nonetheless, comparability
14 between them notwithstanding that one is for profit
15 and the other is avowedly not for profit?

16 A I think the comparability is when you
17 make the adjustment in the formula here and you take
18 it into account in terms of the revenue from public
19 broadcasting, and particularly focusing only on the
20 revenue from the private sources.

21 To the extent that that's a distinction,
22 that's one of the reasons we took it out of that

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1 portion of the calculation when trying to arrive at
2 this fee proposal.

3 Q Do you find that public broadcasting and
4 commercial broadcasting are substantially comparable
5 in terms of their programming fare?

6 MR. SCHAEFFER: I don't know if he's
7 qualified to answer that. We haven't tendered him as
8 an expert on programming fare. We have tendered two
9 --

10 MR. RICH: Well, let me ask the question
11 differently.

12 CHAIRPERSON GRIFFITH: All right, do you
13 withdraw that question?

14 MR. RICH: Yes, I'll withdraw it.

15 BY MR. RICH:

16 Q Let me ask you this. When you cite
17 substantial similarity operationally, what do you have
18 in mind? What is it about the two that you find
19 comparable?

20 A That they're over the air broadcasters,
21 that they have FCC licenses, that they transmit
22 programming to households throughout the country using

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1 essentially the same technology, that in many respects
2 they're competing for the same audience, that they're
3 national in scope.

4 All of those factors in terms of how they
5 operate seems to me to make them similar to other over
6 the air broadcasters, which is why we looked at that
7 industry. To the extent that they have differences in
8 programming, it's reflected in the music use portion
9 of the adjustment there.

10 Q Anything else?

11 A That's what comes to mind at the moment.
12 There may be some other factors. I think those are
13 the important ones.

14 Q Now I take it by using the word
15 "currently" in your testimony -- when you say that
16 they "currently operate," I take it you're not
17 suggesting that these are recent comparisons as
18 opposed to comparisons which could likewise have been
19 drawn five, ten, 15 and even 20 years ago?

20 A I'm not sure the same would have been true
21 20 years ago. One of the things we've seen over the
22 years -- one part of our whole case is that the public

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1 broadcasting appears to be operating in a way that's
2 more comparable to commercial broadcasters now than in
3 the past.

4 I think it's hard to put any specific
5 dividing point to it. It's a gradual thing. But
6 approximately half the revenue now comes from private
7 sources. That certainly wasn't the case 20 years ago
8 and probably not ten years ago.

9 And so that kind of change has been going
10 on, and it's part of the reason we've made the
11 proposal we made and we've adjusted the fees -- we've
12 asked for the fees we've asked for, to recognize those
13 changes.

14 Q Let's talk about some of those changes and
15 when they occurred. You talked about modes of
16 distribution.

17 Have the channels of distribution by which
18 programming is distributed by public television
19 changed materially in the last five or ten years?

20 A I don't believe so.

21 Q Has there been a material change in
22 commercial broadcasting's channels of distribution in

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1 the last five or ten years?

2 A I don't believe so.

3 Q Take a look at your Appendix B, please.
4 I guess it's styled Final Revised Appendix B. I want
5 to talk about use of music and the changes in use of
6 music. Turn to page six, please.

7 Am I correct in reading the results of the
8 music analysis on page six, and taking for a moment
9 your music methodology of face value -- that would be
10 the subject of a later cross examination by agreement
11 with the Panel.

12 I take it it shows less than a ten percent
13 increase in average music use credits per hour for
14 public television between the 1990 through '92 period
15 and the 1993 through 1995 period, correct, something
16 under ten percent?

17 A If you're comparing the averages for each
18 of those three --

19 Q Yes.

20 A -- year periods, yes; that's right.

21 Q Which is what you purport to do here,
22 correct?

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1 A Yes, that's right.

2 Q So that's not a seed change, is it?

3 A No.

4 Q And if we were to compare survey years for
5 which your survey sizes are comparable -- that is,
6 beginning as of 1991 when you're up at the 1,500
7 roughly range of survey size -- am I correct that if
8 we computed the difference in average credits per hour
9 for 1991 and 1992, which takes you to 2.065, versus
10 '93 through '95, you've have about a two percent
11 increase over those periods?

12 A I'm afraid you lost me with that one.

13 Q What I'm doing here --

14 A 2.065 --

15 Q -- is striking 1990 for the moment --

16 A Okay.

17 Q -- and asking you to compare the average
18 of 1991 and 1992 average credits, that is 1.79 and
19 2.34, which my math takes me to an average of 2.065;
20 with the average for 1993 to '95 which is 2.11, and by
21 my math that's about a two percent increase in average
22 credits per hour comparing those two periods.

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1 Is that about right?

2 A I haven't done the math, but that looks
3 about right.

4 Q And if you flip to pages seven and eight,
5 which is your commercial television music use
6 analysis, you show no precipitous change in commercial
7 television's use of ASCAP music during the 1990
8 through 1995 period, do you?

9 A No.

10 Q So nothing significant has changed in the
11 relative music use of commercial and noncommercial
12 television during the period you surveyed, isn't that
13 correct?

14 A I think that's essentially correct.
15 Public television uses more music now, about 41%, and
16 they consistently did throughout this period.

17 Q Now turn to page 11, if you will, which is
18 your radio results. As to public radio, if I read
19 your analysis correctly, there's actually been a
20 decline in the use of ASCAP music from 3.86 average
21 credits per hour for the period 1990 through 1992 to
22 2.89 average credits per hour for the 1993 to '95

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1 period.

2 Is that a correct reading?

3 A Yes.

4 Q And by my math, that's a decrease of more
5 than 25%, correct?

6 A That looks approximately right. I haven't
7 checked the math, but that looks about right.

8 Q And turning to page 12, during that same
9 time period, commercial radio's use of ASCAP music
10 has, according to your data, declined by less than
11 five percent.

12 Is that also correct?

13 If you'd like a calculator, I can make one
14 available.

15 A That sounds about right. That looks about
16 right.

17 Q So what ASCAP has experienced in radio, if
18 I interpret your data correctly, is a five times
19 greater rate of reduction in the use of ASCAP music by
20 public radio than by commercial radio over the 1990 to
21 1995 period surveyed by ASCAP and offered as evidence
22 in this case, is that correct?

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1 A Given the math you just did, that sounds
2 about right.

3 Q Is that a movement by public radio closer
4 to or farther away from commercial broadcasting?

5 A I think what the figures show is public
6 radio used music -- more ASCAP music in the earlier
7 years and are now using music much more -- on average
8 of more closely the way the commercial broadcasters
9 use.

10 And in fact, for the 1995, they used about
11 three or four percent less music per hour, which is
12 why we made the adjustment on the fee calculation to
13 reflect that.

14 Q Now turning to public television's revenue
15 sources, you are not asserting, I take it, that the
16 diversity of sources of public radio and television
17 income have changed in the last five or ten year
18 period, are you?

19 A I'm not sure about the last five or ten
20 year period, but certainly over the entire period from
21 original fee determination they have.

22 Q So your scope of reference is all the way

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1 back to 1978?

2 A Sure.

3 Q But if you'll adopt my scope of reference,
4 at least for purposes of this cross examination,
5 you're not asserting there's been much change in the
6 diversity of sources of funding, correct?

7 A I haven't looked at the figures from five
8 or ten years ago to see how close they are to the
9 roughly 50/50 split between private --

10 Q Well, I thought we --

11 A -- and tax base funding for 1995 that we
12 have.

13 Q I thought we'd do just that exercise.

14 You have already testified today, and I
15 think it's in the binder supplied to the Panel, that
16 you derive a -- you used CPB fiscal year 1995 report
17 to derive certain private revenue data, correct?

18 A Yes.

19 Q You testified about that?

20 A Yes.

21 Q And you derived a number -- a private
22 revenue number combining -- or excluding, I think you

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1 said, six categories at the top to derive a number of
2 \$741.9 million dollars in private revenue?

3 A That sounds --

4 Q To your left.

5 A -- correct.

6 Q It's right on the board there. See it?

7 A Well, I remember the number; I don't
8 remember all the categories. But that sounds about
9 right.

10 Q Okay.

11 A Certain of the revenue numbers, right.

12 Q And that's off the total revenue base,
13 private and tax-based, of about a billion four,
14 correct?

15 A Yes, that's right; a billion four, almost
16 a billion five.

17 Q And that was something over 50%, I believe
18 you testified, meaning something over 50% of total
19 public broadcasting revenue as of FY95 was devoted to
20 what you defined as private revenue sources, correct?

21 A That's right, about 51% was from private
22 funding.

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1 Q Okay. Now I'm going to mark as the next
2 two hearing exhibits the comparable CPB year end
3 reports for fiscal year '90 and for fiscal year 1985.

4 JUDGE DREYFUS: Which is which, Counsel?

5 MR. RICH: Let's mark as -- what is our
6 next sequential number?

7 JUDGE DREYFUS: Twenty-four.

8 MR. RICH: Let's mark 1990 as 24, please,
9 and 1985 as 25.

10 (Whereupon, the above-mentioned
11 documents were marked as PB
12 Exhibits 24X and 25X for
13 identification.)

14 BY MR. RICH:

15 Q Dr. Boyle, if you would first turn your
16 attention to what we've marked as PB 24X, which is the
17 fiscal year '90 CPB report. And turn to Table 1 in
18 that report which is one, two, three -- the fifth
19 page, please.

20 Do you see a line just above the first
21 semi-solid horizontal line labeled "private (percent
22 of total)" down the left-hand column?

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1 A Yes, I do.

2 Q And coursing through that, beginning with
3 FY1985, am I correct that this chart depicts that a
4 majority, around -- between 50 and 53% of all public
5 broadcasting income is derived from what here is
6 listed as private as opposed to tax-based sources?

7 A Well, certainly it indicates that the
8 private income is that share of the total. I think
9 the total probably is more than just private and tax-
10 based. It would also include the grants and the CPB
11 funding.

12 Q If you would turn to Table 2.

13 A Excuse me.

14 If you're saying the prior three lines are
15 all lumped as tax-based -- the prior line is labeled
16 state and local tax-based, and those two certainly
17 don't add up to 100. But if you're including all
18 three before, then you're probably right.

19 Q Well, if you would flip one more page on
20 into this document to something labeled Table 2. And
21 if you would compare this document to the document you
22 earlier testified to for FY95, does it appear to you

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1 to set forth the same categories of funding sources as
2 the FY95 document does?

3 A Yes, it does.

4 Q And so methodologically, if we wanted to
5 compute, as you did before, what percentage of total
6 public broadcasting income in FY90 was attributable to
7 private revenues, how would we go about that from this
8 page?

9 A You would do the same calculations. You'd
10 draw a line at the -- between other public colleges
11 and universities and private colleges and universities
12 and tally up the numbers. And I think they would
13 probably tie in total to the number shown as private
14 on the prior table, but I haven't done the math.

15 Q Anticipating that that would be your
16 answer, I did the math. And I'll represent to you,
17 subject to your checking it at your leisure, that the
18 total is about 53%. That is, about 53% of total
19 public broadcast income for FY1990 was from private
20 sources as you defined them, okay?

21 A Actually it's as CPB defines them; but
22 sure, that sounds right.

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1 Q As CPB defines them, and as you
2 methodologically drew upon such data for your 1995
3 analysis, right?

4 A Yes.

5 Q Now if we look at the document that's been
6 marked as PB 25X, --

7 A That's a 1985 --

8 Q 1985 document.

9 And look at the fifth page of this
10 document, please.

11 A Table 2?

12 Q Yes. Do you recognize the same
13 categories?

14 A Yes, they look the same.

15 Q So I take it we would perform the same
16 math to arrive at the private revenues percentages?

17 A Yes.

18 Q And I'll represent to you, having done the
19 math, that I get about 52.5% doing that, okay?

20 A All right.

21 Q Now, would you agree with me then that, in
22 comparison to the private revenue percent which you

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1 computed for FY '95, the 1990 and 1985 data are
2 comparable?

3 MR. SHORE: Objection. I don't understand
4 -- I didn't ever understand to calculate a percent he
5 calculated the dollar figure. But --

6 BY MR. RICH:

7 Q I believe -- and part of your direct
8 testimony, correct me if I misheard, represented a 50
9 point some fashion percent of total public
10 broadcasting income reflected in 740 -- is reflected
11 in the \$741.9 million dollar number, is that correct?

12 A I believe so. I believe I said it was
13 about 51%.

14 Q Would you agree that that percentage is
15 comparable over time back at least as far as 1985 from
16 what you've now seen?

17 A Yes.

18 Q Okay.

19 MR. RICH: At this point, I'd like to
20 offer PB 24X and 25X into evidence.

21 CHAIRPERSON GRIFFITH: Any objection?

22 MR. SHORE: No objection.

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1 CHAIRPERSON GRIFFITH: All right, it will
2 be received without objection.

3 (Whereupon, the above-mentioned
4 documents, previously marked as
5 PB Exhibits 24X and 25 X for
6 identification, were received
7 in evidence.)

8 BY MR. RICH:

9 Q Now, Dr. Boyle, is it -- you indicate that
10 you take the low look here back to '78 or so, correct,
11 --

12 A Yes.

13 Q -- from the change?

14 Isn't it a fact, however, that as early as
15 1975, in opposing enactment of Section 118, ASCAP
16 publicly maintained (1) that public broadcasting
17 rivaled commercial broadcasting in structure and (2)
18 that it competed with commercial broadcasting for
19 sponsorship resources?

20 Wasn't it saying that as early as 1975, to
21 your knowledge?

22 A I have no idea.

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1 My understanding in 1975 was public
2 broadcasting wasn't even subject to license fee.

3 Q Now let me show you a document we will
4 next mark as PB 26X which is ASCAP's testimony before
5 the House Subcommittee on Courts, Civil Liberties and
6 Administration of Justice delivered on July 10 of
7 1975.

8 (Whereupon, the above-mentioned
9 document was marked as PB
10 E x h i b i t 2 6 X f o r
11 identification.)

12 And while you're free to look over as much
13 of this as you'd like, I want to focus your attention
14 at the top of page 933 of this document and ask you
15 if, in researching your economic proposal for this
16 proceeding, you familiarized yourself with the fact
17 that back in 1975 ASCAP, in a statement submitted to
18 the House of Representatives, said, quote, "We find
19 that public" -- this is the first full paragraph on
20 933.

21 "We find that public broadcasting not only
22 rivals commercial broadcasting in structure and

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1 competes for the same audience, but it also competes
2 with commercial broadcasting for sponsorship revenues.
3 Indeed, public television is viewed by many as the
4 best institutional advertising medium available.

5 "If it sells companies rather than
6 products, it is no less an advertising medium."

7 Have you ever seen that before?

8 A No. May I take a look at the document?

9 Q Please.

10 A Thank you.

11 MR. RICH: Your Honors, as the witness is
12 studying the document, time-wise, if there is some
13 flexibility to run a little bit beyond 5:00, perhaps
14 half an hour, I'd like to try to finish this section
15 of my cross examination today.

16 CHAIRPERSON GRIFFITH: Okay.

17 MR. RICH: Is that agreeable with Counsel?

18 MR. SCHAEFFER: I assume our redirect will
19 be at the conclusion of the next session of Mr.
20 Rich's, is that -- I mean, that's the only caveat I
21 have.

22 CHAIRPERSON GRIFFITH: I think what we'll

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1 -- my impression was that we were going to simply
2 continue the cross examination until the next session,
3 and after that would follow redirect.

4 MR. SCHAEFFER: Fine.

5 I assume a week from Monday?

6 MR. RICH: The next scheduled session.

7 CHAIRPERSON GRIFFITH: Yes.

8 MR. SCHAEFFER: No, no; I assume at the
9 conclusion of PBS's case.

10 MR. RICH: Well, that's what i was --
11 assuming I can get through my material today, I was
12 planning next to see Dr. Boyle during the rebuttal
13 phase and discuss the music data.

14 CHAIRPERSON GRIFFITH: Right.

15 MR. RICH: And so it's the Panel's
16 judgement whether you wish redirect on this portion of
17 my examination or hold the whole thing.

18 MR. SCHAEFFER: Well, obviously we'll
19 defer to the Panel. It seems to me logical to bring
20 Mr. Boyle back at the conclusion. I didn't -- there's
21 nothing in the stipulation about the rebuttal phase.
22 And we haven't signed the stipulation yet, but I

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1 thought it was satisfactory.

2 I thought we were going to bring Boyle
3 back at the conclusion of PBS's case, and then we can
4 do the redirect then. If we put it off to the
5 rebuttal stage, everybody's going to lose kind of the
6 impression and it's a long time from now.

7 MR. RICH: Then I prefer it be done today
8 before we adjourn, frankly. I think that's the proper
9 time table.

10 MR. SCHAEFFER: I don't think we're ready
11 to do redirect today, and I'm certainly not ready --
12 we're not ready at this late hour.

13 CHAIRPERSON GRIFFITH: Tomorrow morning?

14 MR. KLEINBERG: I can't do it. I mean,
15 I've, you know, conducted myself according to the
16 schedule we laid out.

17 CHAIRPERSON GRIFFITH: Well, you tell us
18 your choice, and then we'll tell you when it's going
19 to be.

20 MR. SCHAEFFER: I would like to do it --
21 because I don't want to disrupt PBS's case. I assume
22 they have witnesses. If they don't, then it would be

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1 -- and it's an easy matter, than we can do it at the
2 first day of the PBS case.

3 But otherwise, I would say the day after
4 the PBS is completed, then we'll finish with Boyle.
5 And then we can go to rebuttal and all the rest of it.

6 MR. RICH: Seems to me there are only two
7 logical times to do it -- immediately following my
8 cross examination today, and I'm prepared to stay if
9 the Panel is; or not doing it at all until after I
10 complete my total cross examination of Dr. Boyle
11 during the rebuttal phase.

12 MR. SCHAEFFER: But we didn't --

13 MR. RICH: But to come in at the beginning
14 of our case on the 30th, --

15 MR. SCHAEFFER: I didn't say --

16 MR. RICH: -- and then he has to do
17 redirect doesn't make any sense.

18 MR. SCHAEFFER: I thought it was at the --
19 no, you misheard me, Mr. Rich. I said at the
20 conclusion of PBS's case, we'll bring Boyle back. You
21 could finish Boyle. That will give you plenty of
22 time. I assumed that --

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1 MR. RICH: That wasn't the agreement
2 though. Read your own stipulation. We're bringing
3 him back in the rebuttal phase.

4 MR. SCHAEFFER: Well, we're not prepared
5 to do the redirect today at this late hour. There's
6 a substantial amount of redirect and we've got to do
7 some work on it.

8 MR. RICH: I never heard of such a thing,
9 frankly.

10 MR. SCHAEFFER: It happens every day in
11 the courts of the United States. I don't know what
12 you haven't heard before. We really need some time to
13 prepare for redirect. I don't care, we can do it next
14 week if you want.

15 MR. KLEINBERG: I would just proffer the
16 following observation: I thought that we had
17 contemplated we were going to finish today if
18 possible, --

19 MR. SCHAEFFER: Yes.

20 MR. KLEINBERG: -- and that, thereafter,
21 that was -- not that we had to. And that if we
22 didn't, then it should logically be picked up at a

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1 logical time, --

2 MR. SCHAEFFER: Yes.

3 MR. KLEINBERG: -- and, you know, as the
4 best laid plans of all of us go, we may not be
5 finishing all of it. And it just seems to me that was
6 the good faith estimate we all had when we went to
7 eliminate Friday. We contemplated -- and everybody's
8 operating under the same strictures.

9 JUDGE GULIN: The agreement that was
10 presented to us, as I recall it, was that all
11 examination be completed today. And the only portion
12 of the examination that would be taken up in rebuttal
13 was on music usage.

14 And then there could be further redirect
15 on music usage at that time. Now, we're presented
16 with a situation that was not agreed upon apparently
17 -- that was not contemplated by the parties, and that
18 is that we're not going to finish today.

19 So -- well, it appears that --

20 MR. SCHAEFFER: They're going to go until
21 5:30. I mean, to be honest with you, it's kind of --
22 the witness is tired and we're tired. I mean, there's

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1 a certain point of time to do redirect. You've got to
2 take some time to do the redirect.

3 I think this has been a lengthy cross that
4 we've been going on.

5 JUDGE GULIN: Frankly, Mr. Schaeffer, it
6 sounds like you perhaps misunderstood the agreement
7 because you said a moment ago that you weren't
8 prepared to even go to redirect today.

9 MR. SCHAEFFER: Well, I'm not prepared now
10 because I would ordinarily take a half hour break and
11 prepare for redirect when you have such a lengthy
12 cross examination.

13 Do we want to work until 7:00, 8:00?

14 JUDGE GULIN: I understand, I understand.

15 MR. SCHAEFFER: I mean, I've got to have
16 a little time to prepare.

17 JUDGE GULIN: Can counsel maybe meet for
18 a few minutes and try to come up with some agreement
19 on this? I mean, --

20 MR. SCHAEFFER: I'd be glad to do it the
21 first day -- the 30th.

22 MR. RICH: I can't speak for the Panel.

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1 I think the anticipated format, which I certainly
2 share Judge Gulin's recollection and it was certainly
3 my understanding, was to stay tonight and finish this
4 phase of the case, and then we come back and do music
5 in the rebuttal phase.

6 That was clearly my contemplation. I
7 apologize that it's late, but I didn't get to stand up
8 until --

9 JUDGE GULIN: It appears we're not going
10 to be able to do that, Mr. Rich, so we have to deal
11 with reality of the situation.

12 MR. SCHAEFFER: I mean, it's going to be
13 5:30 until he's finished, I assume, and we need a
14 little time to prepare. You know, this was a long --

15 JUDGE GULIN: Well, can you redirect then?

16 MR. SCHAEFFER: I would rather not. It
17 seems to me if we're going to finish, we're going to
18 finish. I'll be glad to stay late tonight, but I need
19 a little time. If we want to, then let's stay until
20 -- we'd be perfectly willing to start our redirect, I
21 think, around 6:30.

22 JUDGE GULIN: Irene, can you stay?

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1 This probably occurred probably because we
2 canceled tomorrow, but the Panel's ready to stay.

3 All right, I just need to make a phone
4 call to cancel an appointment tonight. Can we do
5 that? Shall we take a break now?

6 CHAIRPERSON GRIFFITH: What time do you
7 anticipate we'll be finished?

8 MR. SCHAEFFER: I would think -- I don't
9 know, I haven't done it yet, but --

10 CHAIRPERSON GRIFFITH: If he finishes at
11 5:30?

12 MR. SCHAEFFER: We'll be ready to start
13 again at 6:00. I hope we would be finished by 6:30.

14 CHAIRPERSON GRIFFITH: 6:30? Okay.

15 MR. SCHAEFFER: I would hope. I mean, I
16 don't know, there may be brief -- then there may be
17 brief -- there may be recross.

18 CHAIRPERSON GRIFFITH: I understand.
19 Yeah, just generally.

20 MR. SCHAEFFER: I just need a half -- we
21 just need a half hour to prepare.

22 (Whereupon, the foregoing matter went off

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1 the record at 4:45 p.m. and went back on
2 the record at 4:55 p.m.)

3 CHAIRPERSON GRIFFITH: All right.

4 CROSS EXAMINATION (continued)

5 BY MR. RICH:

6 Q Dr. Boyle, before the break, I was giving
7 you an opportunity to review the document which we
8 have marked as PB 26X. Did you want -- and my pending
9 question was whether you had, in the course of looking
10 back at the history of ASCAP's relationship, been
11 familiar with the fact -- been familiarized with the
12 fact of the sentiments expressed in the ASCAP
13 statement which I read into the record appearing at
14 page 933?

15 A No, I hadn't.

16 If I'm reading this document correctly,
17 this was submitted at a time when public broadcasting
18 was not paying any license fees. And I think the
19 argument we were making was that they should be
20 treated like all other commercial broadcasters and
21 negotiate in the same fashion, which is consistent
22 with what we're proposing here.

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1 MR. RICH: We would offer this document
2 into evidence.

3 MR. SCHAEFFER: No objection.

4 MR. RICH: Now, isn't it --

5 CHAIRPERSON GRIFFITH: It will be received
6 without objection.

7 (Whereupon, the above-mentioned
8 document, previously marked as
9 PB Exhibit 26X for
10 identification, was received in
11 evidence.)

12 MR. RICH: Isn't it also a fact, Dr.
13 Boyle, that ASCAP, all the way back in 1978, made
14 essentially all of the arguments which ASCAP makes
15 here as to the asserted comparability of commercial
16 and noncommercial broadcasting in the context of the
17 one prior litigated CRT proceeding that you testified
18 to earlier?

19 MR. SHORE: Objection. We've got some
20 strange foundational issues here and they keep coming
21 up about asking him things. I mean, his testimony
22 says he came to ASCAP in '81.

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1 THE WITNESS: '85 actually.

2 CHAIRPERSON GRIFFITH: Mr. Rich.

3 BY MR. RICH:

4 Q One of your fee proposals, the so-called
5 trending formula, courses forward from 1978, is that
6 correct?

7 A Yes.

8 Q Why did you pick that year?

9 A Because that was the fee that was set by
10 the Copyright Royalty Tribunal.

11 Q And the fee you refer to is \$1.25 million
12 dollars?

13 A Yes.

14 Q And in -- as ASCAP's chief economist, in
15 evaluating how to do a proper trending formula, did
16 you go back and study any of the underlying data which
17 helped form the basis for the Tribunal's ruling back
18 then?

19 A No, I just started with the fee that they
20 determined and worked from that.

21 Q Let me mark as the next exhibit, as PB
22 27X, a document labeled Statement of the American

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1 Society of Composers, Authors and Publishers which is
2 the prehearing submission by ASCAP in the 1978 CRT
3 proceeding.

4 (Whereupon, the above-mentioned
5 document was marked as PB
6 Exhibit 27X for
7 identification.)

8 And let me direct your attention initially
9 to page two of this document under summary of
10 statement and proposal. Ask you if, in formulating
11 your proposal here, you were aware that ASCAP, in
12 1978, asserted as follows to the CRT:

13 "We shall show that public broadcasting
14 and commercial broadcasting are very much alike."

15 A Excuse -- I'm sorry, I don't see that.

16 Q Beg your pardon. Second sentence.

17 A Okay, I've got it.

18 Q Under summary.

19 A Go ahead.

20 Q "We shall show that public broadcasting
21 and commercial broadcasting are very much alike in
22 virtually all respects relevant to this proceeding.

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1 They compete for audience, sponsors, programming,
2 talent, executive, administrative and technical staff.

3 "Indeed, in virtually all aspects of their
4 operations, the same factors which determine the fair
5 market value or reasonable fees of music for
6 commercial broadcasting should also govern for public
7 broadcasting accordingly.

8 "We submit that the Tribunal's
9 determination here should be consonant with the
10 existing arrangements between ASCAP and commercial
11 broadcasters."

12 Was that a position you were familiar with
13 as you evaluated your trending formula and otherwise
14 performed your economic analysis in connection with
15 this proceeding?

16 A Generally I didn't review all the details
17 of the proposal. I know there are some distinctions
18 between that period and now. For instance, we didn't
19 have final agreements with the local television
20 industry. And with some of the networks, we didn't
21 necessarily have the same bench marks you have now.

22 But the sentiment --

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1 MR. SCHAEFFER: Let him finish the answer,
2 Mr. Rich.

3 THE WITNESS: -- of that proposal, I was
4 aware of that.

5 BY MR. RICH:

6 Q Turning to page 45 of this document, if
7 you will, the paragraph beneath the indented quote,
8 were you aware that in 1978 ASCAP represented to the
9 CRT "there is no doubt that these corporate
10 underwriters are equivalent to sponsors of commercial
11 broadcasters?"

12 A No.

13 Q Turning to page 47 of this document, the
14 first full paragraph, --

15 A The one that starts "clearly?"

16 Q Pardon me. Down at the bottom of the
17 page.

18 Were you aware that in 1978 ASCAP asserted
19 that "public broadcasting uses more ASCAP music than
20 commercial broadcasting?"

21 A No.

22 Q Were you aware, sir, that ASCAP, in this

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1 submission, sought fees as ASCAP does here at
2 equivalent percent of revenue -- on an equivalent
3 revenue percentage basis to that being paid by
4 commercial broadcasters?

5 A That was my general understanding. I
6 don't recall the explicit revenue base of the
7 broadcasting towards that effective rate applied.

8 Q If you'd look at pages nine and ten of
9 this document. Does that perhaps refresh your
10 recollection that ASCAP adduced the commercial fees
11 paid by local commercial television -- network
12 commercial television, as well as commercial radio to
13 ASCAP, as well as adduced data as to the revenues
14 earned by those industries?

15 That's page nine. And then over at page
16 ten, computed what ASCAP believed the appropriate fee
17 for ASCAP to be by applying those effective
18 percentages, namely .83% for television and 1.21% for
19 radio times the then existing public television and
20 public radio revenues.

21 Do you see that?

22 A I see the numbers. As I said, I'm not

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1 sure where the public broadcasting revenue figures
2 came from.

3 Q But did you understand, when you testified
4 today, that that in fact was the methodology ASCAP
5 established before the CRT in 1978?

6 A That's generally what I thought, yes.

7 Q So that it sought a fee somewhat in excess
8 of \$3.6 million dollars looking at the third line on
9 page ten?

10 A I wasn't aware of the dollar amount. I
11 was more aware of the methodology, but that's what the
12 numbers would appear to indicate.

13 Q About three times what the CRT eventually
14 awarded ASCAP, correct?

15 A That's right.

16 Q And I take it that ASCAP -- strike that.

17 MR. RICH: I would offer this document at
18 this point.

19 MR. SCHAEFFER: No objection.

20 CHAIRPERSON GRIFFITH: Mr. Kleinberg.

21 MR. KLEINBERG: No objection.

22 CHAIRPERSON GRIFFITH: It will be received

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1 without objection as PB Exhibit 27X.

2 (Whereupon, the above-mentioned
3 document, previously marked as
4 PB Exhibit 27X for
5 identification, was received in
6 evidence.)

7 BY MR. RICH:

8 Q Now staying with paragraph five of your
9 written testimony, Dr. Boyle, you indicate that once
10 one reaches the conclusion that noncommercial and
11 commercial broadcasting are comparable, the
12 methodology for calculating the correct fee for public
13 broadcasting is, in your words, "quite simple," yes,
14 over at the top of page three?

15 A Yes.

16 Q And that quite simple methodology, I take
17 it, is what fills both sides of that blackboard and
18 about seven or eight pages of this chart?

19 A I think the methodology is right here for
20 TV and there's one similar page for radio. Much of
21 that chart deals with survey and -- it's really those
22 two pages.

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1 Q Do you feel it's self-explanatory?

2 MR. SHORE: If it were, we wouldn't be
3 here this late.

4 THE WITNESS: I think if you read through
5 the testimony and the way it's laid out, it follows,
6 yes.

7 BY MR. RICH:

8 Q It's got a number of moving parts, doesn't
9 it?

10 A I don't know about moving parts. It's got
11 a lot of parts, and each one is the data presented and
12 the sources.

13 Q It involves a number of judgements that
14 you had to make on your part in terms of filling in
15 the equation, yes?

16 A Sure.

17 Q Okay. Let's talk about a few.

18 Your fee proposal would generate fees to
19 ASCAP based upon a formula that would make public and
20 commercial broadcasting's payments comparable on a
21 percentage of revenue basis after certain adjustments
22 are made to public broadcasting revenues, correct?

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1 A Yes, that's essentially correct.

2 Q And these adjustments are to separate out
3 what you term tax-based from private revenues,
4 correct?

5 A Actually what the CPB termed -- used those
6 terms, I believe.

7 Q Now I assume you're aware --

8 A I just took them out.

9 Q I assume you're aware that BMI also
10 predicates its fee proposal in this case in large part
11 on a comparison of the revenues earned by commercial
12 and noncommercial broadcasting?

13 A I believe so. I haven't reviewed the BMI
14 documents in detail. In fact, a lot of them I'm not
15 able to see.

16 Q I appreciate that.

17 Do you happen to know whether BMI, in its
18 own analysis, separates out or distinguishes between
19 tax-based and private revenue sources?

20 A I don't recall that they did, but I didn't
21 read the -- if that was included in the testimony, I
22 was able to look at it in the same level of detail.

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1 I don't think they did. I think they focused on total
2 revenue.

3 Q So that at least, as between you and BMI,
4 there's disagreement on the base of public
5 broadcasting revenue to be utilized for purposes of
6 drawing this comparison, correct?

7 A As I say, I'm not familiar with BMI's case
8 and certainly didn't discuss it with them. So if
9 those are the facts and they proposed it based on
10 different revenue, we've got a distinction.

11 Q Now staying --

12 A Excuse me, assuming there's no differences
13 in the effective rates that they're applying to that
14 revenue base, which is another part of the calculation
15 and perhaps how they treat music use.

16 Q Now looking at the public radio revenue
17 component of your analysis, you factor in all private
18 revenue as you would define it earned by public radio,
19 correct, into the equation?

20 A Yes.

21 Q Okay. And BMI takes a different approach
22 here too, don't they, to your knowledge?

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1 A I thought they used total revenue, but
2 again I didn't review the --

3 Q Do you have knowledge whether BMI's --
4 pardon me.

5 A I think they made some adjustments. I'm
6 not sure it was into the revenue base, but I think
7 they made some adjustments that are probably more akin
8 to what I talk about under the music use side of
9 things.

10 But either way, I think it's going to wind
11 up with a different methodology.

12 Q Do you know whether BMI treats certain
13 portions of public radio revenue as not properly
14 encompassed within the revenue base from which fees
15 should be derived here?

16 A I don't recall their discussions being --
17 making that distinction among the revenue base or
18 programming, so I don't recall there being any --

19 Q Okay.

20 A -- data on revenue on program -- for
21 certain program categories.

22 Q Okay, okay.

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1 Now, on the other side of the ledger,
2 you've taken estimates of the revenues generated by
3 commercial broadcasters, correct?

4 A Yes.

5 Q And you've testified in your presentation
6 and testimony indicates that your commercial
7 television revenue figure for 1995 is \$25.155 billion
8 dollars, correct?

9 A I'm sorry, that's TV. I thought we were
10 just talking about radio.

11 Q Yes, I'm sorry. I am trying to move
12 quickly; and if I'm going too quickly, just stop me.

13 A I lost a transition somewhere there.

14 Q Your 1995 commercial television revenue
15 base is \$25.155 billion dollars, correct?

16 A Yes.

17 Q Isn't it the fact that broadcast
18 television revenues for 1995 were widely recognized as
19 being higher than the figure you're reported?

20 A I don't believe so. I believe the
21 Government publication is an authoritative source.

22 Q Are you aware that BMI has asserted that

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1 1995 commercial television revenues are \$32.5 billion
2 dollars or 30% higher than your estimate?

3 A No.

4 Q Do you know an outfit named Paul Kagan &
5 Associates?

6 A Yes, I'm familiar with them.

7 Q How familiar?

8 A I see a variety of the reports they put
9 out and have used their data from time to time and am
10 familiar with their data.

11 Q Do you respect their data?

12 A Yes, generally.

13 Q Indeed, you've employed them as an expert
14 on television data in the ongoing cable ASCAP rate
15 proceeding, have you not? That is, ASCAP has?

16 A I believe counsel has, yes.

17 Q Yes. And are you aware -- I'm going to
18 represent to you because it's the fact that the BMI
19 \$32.5 billion dollar number is drawn from Kagan &
20 Associates.

21 Does that cause you to perhaps pause about
22 the accuracy of your proffered number of \$25 billion

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1 dollars?

2 A No.

3 Q How is this Panel to decide between
4 Kagan's estimate and the estimate you've proffered,
5 which is a full seven billion dollars apart?

6 MR. SCHAEFFER: I think that's a question
7 asked.

8 MR. RICH: I'm asking if he has any
9 suggestion how the Panel might --

10 MR. SCHAEFFER: I don't think that's an
11 appropriate question to ask a witness. The Panel will
12 evaluate whatever information was given presumably by
13 us, which was a federal report, and by Kagan, if there
14 was any information given.

15 MR. RICH: I'll withdraw the question and
16 rephrase it in light of the objection.

17 CHAIRPERSON GRIFFITH: All right, thank
18 you.

19 BY MR. RICH:

20 Q Do you have any basis for determining
21 which of the two data pieces -- data points for 1995
22 as to commercial television revenue is more reliable,

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1 the data you cite or the data on which BMI relies,
2 namely Kagan & Associates?

3 A I would prefer to rely on Census Bureau
4 data. My understanding is that other sources, Kagan
5 and others, make estimates of ad revenue sales based
6 on unit spot rates and other factors. They may or may
7 not include advertising agency commissions in their
8 calculations.

9 Whereas, the Census Department is asking
10 individual stations for surveys under their normal
11 procedures with their normal checks and controls and
12 edits. I prefer to use the census data.

13 Q Which number generates a larger fee to
14 ASCAP, \$32.5 billion dollars or \$25.5 billion dollars?

15 A The Kagan numbers would generate a -- if
16 you used the higher Kagan numbers, you'd have a higher
17 base here, a lower effective rate and a lower fee. So
18 this approach, based on the census data, would
19 generate a higher effective rate; and therefore, the
20 fee would be higher.

21 Q Do you know an individual named Ross
22 Charap?

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1 A Yes, I do.

2 Q Who is Ross Charap?

3 A Ross Charap is a member of ASCAP staff,
4 one of my colleagues.

5 Q And did you assist Mr. Charap in
6 developing any data in connection with testimony he
7 gave before the United States Copyright Office in May
8 of 1997?

9 A I don't recall seeing the testimony and I
10 don't believe so, but I'd be glad to look at a
11 document if you want me to.

12 Q Is it your practice, when members of
13 ASCAP's management and/or legal staff proffer
14 testimony which involves a number of economic data,
15 for your office to review and sign off on the data
16 submitted?

17 A It would depend. If Mr. Charap asked for
18 my review, I would certainly do so. If he didn't and
19 felt he didn't need it, I wouldn't necessarily see it
20 in advance.

21 Q Let me mark as the next exhibit, which is
22 28X, the testimony of Ross Charap on behalf of ASCAP

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1 before the United States Copyright Office, May 6
2 through 9, 1997.

3 (Whereupon, the above-mentioned
4 document was marked as PB
5 Exhibit 28X for
6 identification.)

7 And I'm going to ask you to look at the
8 bottom of page ten and the top of page 11. Do you see
9 in the carry over sentence, Dr. Boyle, that Mr.
10 Charap, in this testimony, compares commercial
11 television -- broadcast commercial television revenues
12 with that of the cable television industry for 1996?

13 A Give me a moment to take a look if you
14 would, please.

15 This is at the first full -- the second
16 full paragraph on ten?

17 Q Let me read the sentence at the bottom of
18 ten, top of 11.

19 Quote, "By 1996, that number" -- which is
20 a reference to cable industry revenues -- "had climbed
21 even further to a total of \$34 billion dollars
22 surpassing the broadcast industry which had revenues

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1 of \$33.48 billion dollars in the same year."

2 Do you see that?

3 A Yes, I do.

4 Q Now do you believe it to be the fact that
5 between 1995, when you report television revenues at
6 \$25.5 billion dollars, and 1996 when Mr. Charap of
7 ASCAP reports them at \$33.48 billion dollars, that
8 there was about a 33% increase in broadcast television
9 revenues?

10 MR. SHORE: This is all speculation.
11 Objection. .

12 CHAIRPERSON GRIFFITH: Do you want to
13 respond, Mr. Rich?

14 MR. RICH: I'm asking him whether this is
15 data sponsored by ASCAP that appears to me to be
16 inconsistent. I'm just probing.

17 MR. SHORE: First of all, it's not
18 inconsistent. It may appear inconsistent to him, but
19 it's a legal matter. It's not inconsistent. But
20 asking Dr. Boyle to speculate about what might have
21 happened in the broadcast industry based upon what
22 someone else at ASCAP might have said -- or said in a

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1 hearing based upon some other data source really
2 doesn't get to the question of whether that number is
3 correct.

4 JUDGE GULIN: I think, Mr. Rich, if you
5 would ask the question -- you're assuming that he
6 agrees that the \$33.48 billion dollars is the correct
7 figure. I think you first have to establish that
8 before you ask him what the increase was.

9 MR. RICH: Fair enough.

10 BY MR. RICH:

11 Q Do you believe Mr. Charap was in error in
12 citing this figure to the Copyright Office?

13 A No, I would be sure that Mr. Charap cited
14 the figure correctly. He used a different data source
15 and there are obviously some differences between the
16 data.

17 Q Well, just as a factual matter, following
18 as you do closely, I take it, trends in television
19 industry economics, to your knowledge, was there
20 approximately a 33% increase in broadcast television
21 income between 1995 and 1996?

22 MR. SHORE: That's the same question.

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1 CHAIRPERSON GRIFFITH: He's an expert
2 witness now and he's testified as to trends, and I
3 think he should be -- do you have any -- the objection
4 is overruled.

5 THE WITNESS: No, I don't think there was
6 that kind of growth. I think the figures are more
7 consistent with the Census Bureau figures. If I
8 remember correctly, I think we glanced a similar issue
9 probably during the local TV rate proceeding where we
10 were looking at a time series of Federal
11 Communications Commission data collected through 1980
12 and other industry-wide estimates made by sources like
13 Kagan and others starting in 1981 when the Reagan
14 Administration cut out a lot of the data collection.

15 If I recall that testimony at that time,
16 we found that for periods where there were common data
17 sources, the Kagan-type estimates tended to be higher
18 and we made some adjustments to resources based on the
19 FCC figures from prior years.

20 So there's always been some
21 inconsistencies between these type of data. And it
22 seems to me the Government collected ones whether the

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1 FCC or the Census Bureau or the type you'd want to
2 watch.

3 Q Are you familiar with the basis on which
4 Kagan & Associates arrived at this \$32.5 billion
5 dollar estimate of commercial television revenues for
6 1996?

7 A No.

8 Q Are you familiar with how Competitive
9 Media Reporting, Inc./Magazine Publishers of America,
10 Inc. arrived at an estimate of \$33.48 billion dollars
11 in commercial television advertising revenues for
12 1996?

13 A I'm sorry, where is that shown?

14 Q This is the source cited by Mr. Charap in
15 his testimony.

16 A What page? Where is that?

17 Q Page 11, footnote 22.

18 A No.

19 Q So when you say you have some apparent
20 degree of -- or some sense that your number's more
21 reliable, on what do you base that conclusion?

22 A Again, not my number; the Government

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1 number based on the Census Bureau surveys according to
2 their procedures and based on prior analyses and other
3 proceedings such as the local TV proceeding. I think
4 we examined some of the similar issues as well.

5 Q What is it you recall that we examined in
6 the local TV proceeding that's similar?

7 A I'm sorry, I thought I mentioned that a
8 few minutes ago. We took a look at the time series of
9 the revenues reported to the Federal Communications
10 Commission through 1980 when they were collecting such
11 data.

12 They stopped in 1980, as I recall, and
13 started in 1981. And after, they were only publicly
14 available sources estimates of ad revenue.

15 JUDGE GULIN: Louder, please.

16 THE WITNESS: The Federal Communications
17 Commission collected ad revenue data for the radio and
18 television broadcast industry, the commercial
19 industry, through 1980. Under some of the
20 deregulation phases starting in 1981, a lot of that
21 data collection effort was eliminated.

22 And there were other sources similar to

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1 the Kagan sources and the Competitive Media Reporting
2 sources that you mentioned for the past 1981 period in
3 trying to put those figures together. We had some
4 years where we had both FCC data and other industry
5 wide estimates and we could look at that.

6 And there was a fairly consistent pattern,
7 as I recall. It's been a while since I looked at the
8 testimony, but there was a fairly consistent pattern
9 showing that the FCC data were lower than the other
10 sources.

11 And in fact, we adjusted the other
12 industry estimates for the later periods in line with
13 that. So I've looked at this before, I believe. And
14 I've used Census Bureau data regularly in other cases
15 -- in other analyses, and I've always found it to be
16 reliable.

17 BY MR. RICH:

18 Q Since 1980, there has been no compulsory
19 reporting of revenue data by commercial television
20 broadcasters, correct?

21 A That's right.

22 Q So everybody's estimating, correct?

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1 A That's right.

2 Q The Government as well, correct?

3 A Well, the Government is -- the Census
4 Bureau is getting reports from stations. They're
5 actually going out as part of their normal census
6 publications like they do in a variety of the census
7 service industries in collecting this information.

8 The other sources, I believe, are
9 estimated without going to all the individual stations
10 in the same way that the Bureau of the Census --

11 MR. SCHAEFFER: Keep your voice up.
12 You're talking too fast. I think people aren't
13 hearing you. Take your time.

14 MR. RICH: Do you have more to add?

15 THE WITNESS: No.

16 MR. RICH: I'd like to offer Mr. Charap's
17 testimony in evidence at this time.

18 MR. SCHAEFFER: Only for the purpose of
19 impeaching credibility, not for proof of figures.

20 CHAIRPERSON GRIFFITH: Mr. Kleinberg, any
21 objection?

22 MR. KLEINBERG: No.

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1 CHAIRPERSON GRIFFITH: It will be
2 received, PB Exhibit 28X.

3 (Whereupon, the above-mentioned
4 document, previously marked as
5 PB Exhibit 28X for
6 identification, was received in
7 evidence.)

8 MR. SCHAEFFER: Your Honor, I assume it's
9 subject to the qualifications that it's only to
10 impeaching credibility, not for proof of those
11 figures?

12 CHAIRPERSON GRIFFITH: That's the focus of
13 the cross examination this morning.

14 MR. SCHAEFFER: Thank you, Your Honor.

15 BY MR. RICH:

16 Q Now, I take it, on the radio side, you
17 estimate 1995 commercial revenues at \$8.765 billion
18 dollars?

19 A Well, that's the figure I use from the
20 Census Bureau, yes.

21 Q And are you aware that Kagan -- this is
22 BMI Exhibit 41 -- estimates radio revenues for the

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1 same year in commercial at \$11.4 billion dollars?

2 A No.

3 Q Are you again confident that your data are
4 better than BMI's data?

5 A Not BMI's data. It's Kagan data, but I
6 think the Census Bureau data are very reliable, yes.

7 Q Even though you're not familiar with the
8 methodology Kagan has used to develop this data,
9 correct?

10 MR. SCHAEFFER: Objection. He testified
11 as to what he understood Kagan's methodology was.
12 That wasn't the basis for Mr. --

13 CHAIRPERSON GRIFFITH: The objection is
14 sustained.

15 MR. RICH: But once again, whoever's
16 right, you and BMI differ on how to compute what you
17 term in your testimony to be a simple fee, correct?

18 MR. SCHAEFFER: Again, I object unless
19 he's saying he assumes that Mr. -- that Dr. Boyle is
20 aware of what BMI thinks.

21 CHAIRPERSON GRIFFITH: Mr. Rich, I think
22 -- can you --

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1 MR. RICH: I'll withdraw the question.

2 CHAIRPERSON GRIFFITH: Withdraw or
3 rephrase the question, one or the two.

4 MR. RICH: Dr. Boyle, by our math, just
5 assuming for purposes of computation that the Kagan
6 numbers in fact are as reliable or more reliable than
7 yours, --

8 MR. SCHAEFFER: Objection. It isn't his,
9 Your Honor; it's the Census Bureau.

10 MR. RICH: By our math, substituting the
11 Kagan revenue estimates for those used by ASCAP would
12 reduce ASCAP's proposal for television from \$4,612,000
13 per year to \$3,570,000 per year, and its radio
14 proposal from \$3,370,000 per year to some \$2,560,000
15 per year.

16 You would agree that's a rather
17 significant difference computationally, correct?

18 MR. SCHAEFFER: I object. How can he
19 answer that unless he knows what the Kagan figure is
20 for public broadcasting?

21 CHAIRPERSON GRIFFITH: Too much there and
22 they're really not his figures. They're figures he

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1 relied on.

2 MR. RICH: Do you agree, Dr. Boyle, that

3 --

4 MR. SCHAEFFER: Is that assuming the
5 public broadcasting is the same as the Census -- as
6 what we've got, or is it --

7 BY MR. RICH:

8 Q Holding everything else in your equation
9 constant and simply replacing your Census data for
10 1995 for commercial television and radio with the
11 Kagan data, I'm going to present to you that the
12 overall impact on ASCAP's fee proposal would be to
13 decrease it from \$7,982,000 to \$6,130,000, close to
14 two million dollars.

15 And you would agree that's a significant
16 impact, is it not, economically speaking?

17 A And what was the last number after the
18 calculations?

19 Q \$6,130,000 a year.

20 A Yes, I would agree that that's
21 significant; however, I think that either of them are
22 much greater than the current fee level. It shows the

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1 current fee level is just too low and doesn't reflect
2 the competitive economic situations that either of
3 those fees is more close to what the value should be
4 for the use of the repertory.

5 Q Well, that may be your position, sir. I
6 can think of a lot of numbers that a lot higher, but
7 we're looking at your methodology. And the purpose of
8 this examination is to rest and probe the soundness of
9 your methodology.

10 CHAIRPERSON GRIFFITH: Just pose the nest
11 question, please sir.

12 MR. RICH: Paragraph six of your
13 testimony, Dr. Boyle. You state that -- strike that.

14 Am I correct, Dr. Boyle, that in a ten
15 year period between 1986 and 1996, the cumulative
16 license fees paid to ASCAP by the ABC, CBS and NBC
17 television networks grew by some 5.5%?

18 To help you in thinking it though, by my
19 math, 1986 total three network fees were about \$3.07
20 million dollars versus \$31.75 million dollars as
21 testified to by Mr. Reimer for 1996.

22 Sound about right?

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1 MR. SCHAEFFER: I don't think --

2 THE WITNESS: The '95 figures sound about
3 right. I don't recall the '85.

4 BY MR. RICH:

5 Q '86.

6 A '86, excuse me. The 1986 figures.

7 Q You just don't recall or it sounds too --

8 MR. SCHAEFFER: Let him answer the
9 question, Mr. Rich. I know you're impatient, but slow
10 down.

11 CHAIRPERSON GRIFFITH: Just a moment,
12 please.

13 Were you finished with your answer, sir?

14 THE WITNESS: Yes, I was.

15 CHAIRPERSON GRIFFITH: All right, next
16 question.

17 BY MR. RICH:

18 Q Are you saying you think it's wrong or you
19 don't know or --

20 A No, I just don't recall.

21 Q Which of the three network fees do you
22 recall for 1986?

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1 A None of them explicitly for 1986.

2 Q Do you recall the fees averaging
3 significantly more than \$10 million dollars per year
4 in 1986 for ABC, CBS and NBC television network?

5 A No, I thought they were lower in 1986.

6 Q What do you think they are?

7 MR. SCHAEFFER: Objection. Did you say
8 "are" or "were?"

9 BY MR. RICH:

10 Q Are for the year 1986.

11 A I don't recall.

12 Q Did not ABC pay ASCAP \$10.47 million
13 dollars for 1986?

14 A For the year 1986, as regardless of when
15 they were paid?

16 Q Yes.

17 A Was that the first year for which they
18 were open in the Rate Court proceeding?

19 Q Yes.

20 A That would probably be right then because
21 Judge Conner's decision covered that period. They
22 would have paid that money at a late -- I don't think

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1 the fees they paid in 1986 were at that level, but
2 that's -- I think the Rate Court determination --

3 Q Attributable to --

4 A -- five or six years later went back and
5 retroactively adjusted the fees. So that may well be
6 right for ABC.

7 Q And do you recall that the fees
8 attributable to 1986 for both NBC and CBS television
9 networks were \$9.8 million dollars?

10 A I'm sorry, could you repeat that again?

11 Q \$9.8 million dollars --

12 A For which networks?

13 Q -- for NBC and CBS attributable to 1986.

14 A I'm not sure about that. I don't recall
15 the CBS fees precisely, although it may be right. The
16 NBC fees we made a multi-year retroactive adjustment
17 that stretched back into the late 70's or early 80's
18 at some point in the 1990's.

19 And I don't recall, without looking at the
20 license agreement, how all those -- how all those
21 rates were eventually allocated to the prior years.
22 There was an explicit schedule, but I certainly

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1 haven't committed it to memory.

2 Q By orders of magnitude, however, you agree
3 with me that there was a single digit level of
4 increase between 1986 and 1995 in the fees paid to
5 ASCAP by the three broadcast television networks,
6 correct?

7 A I think that's probably right once you
8 sort out all the timing. I don't think those level of
9 fees were paid in 1986, but I think there were
10 subsequent, retroactive adjustments that would
11 probably lead you to about that result.

12 Q Now looking at local commercial television
13 for the same ten year period, is my math at least
14 close to being right in indicating that, in 1986,
15 local commercial television stations overall paid
16 ASCAP approximately \$70 million dollars versus \$75
17 million dollars in 1995?

18 Sound about right?

19 A Again, these are payments in each of those
20 years or before those years?

21 Q Attributable to those years.

22 A That's going to be a lot harder to figure

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1 out, I think. If I remember correctly, when we
2 settled the local TV license situation through 1995 --
3 I guess through September of 1995, if I've got the
4 dates right, there was a lump sum adjustment that
5 affected the entire length of the local TV proceeding.

6 We have been in court with the local TV
7 industry for as far back as probably 1972 for at least
8 some of the stations. And as I recall the end of the
9 proceeding, there was one lump sum agreement that was
10 not allocated by years at all because the parties
11 could not reach agreement on how to do that.

12 We could agree on the total dollars, but
13 not the allocation. So these attributing fees to
14 1986, regardless of when paid, would be -- I'd have to
15 take some careful look at that. I'm not sure how easy
16 that is to do.

17 Q Does a ten year growth rate in fees of
18 about seven percent for the local commercial
19 television broadcasters sound about right to you?

20 A You were saying by 1995, if these were up
21 to what, about \$75 million?

22 Q Between 19 --

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1 A The \$75 million sounds a little low to me,
2 and the growth rate may be a little bit on the low
3 side.

4 Q Can we nevertheless agree that in 1986
5 public broadcasting paid ASCAP \$2.42 million dollars,
6 and in 1995 \$2.99 million dollars, which reflects a
7 23.5% increase?

8 A The last year I certainly recall. The
9 1986 figure I don't without looking back at the
10 license agreement.

11 Q It will be in the record.

12 And I wouldn't belabor this with you, sir,
13 if there were in the record of this proceeding the
14 actual three network -- commercial network and local
15 station data. But since we don't have it, I'm probing
16 your best recollection.

17 Now am I correct, coming back to the local
18 commercial television for a second, that that industry
19 paid flat interim license fees to ASCAP for the period
20 1995 through 1994 -- 1985 through 1994, roughly
21 approximately -- roughly equaling \$72 million dollars?

22 Do you recall that?

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1 A These are interim fees for the years --

2 Q '85 through '94.

3 A -- '85 through 1994?

4 Let's see, at that point in time, we would
5 have been in court asking for the determination of
6 final fees, and I think the interim fees were based on
7 what was paid in 1982 -- whatever the flat dollars
8 were in 1982, with some provision to deal with new
9 licensed stations.

10 That's probably about right. They
11 probably were about flat until the proceeding was
12 finished.

13 Q And so any adjustments to which you refer
14 that later occurred to calendar year 1986, by
15 definition, would have only increased the number above
16 \$72 million dollars, correct, for that year?

17 A Might have; it might not have.

18 As I recall, there was ultimately an
19 adjustment of approximately \$14 million dollars, and
20 there was no specification of years. You know, I
21 don't know, it may have been that the early years were
22 right and it would have been later years.

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1 I don't know. It was just an agreement
2 for that amount of money to cover the entire period.
3 And in fact, for some of the stations, I think it went
4 back as far as 1972. It wasn't even an attribution to
5 stations if I remember correctly; it was a settlement
6 with the entire industry as part of finishing up the
7 litigation.

8 Q You don't recall the industry writing a
9 check to ASCAP, do you?

10 Pardon me, ASCAP writing a check to the
11 industry. It's getting late.

12 A I think it would have been the industry
13 writing a check to ASCAP actually.

14 Q Yes.

15 A And no, the individual stations didn't, as
16 I recall. It was their '94 and '95 fees were used to
17 allocate that prior period settlement. There was on
18 attempt to go back and adjust the records for whatever
19 the prior -- the situation was in those prior years.

20 Q Let me see if your five year memory is any
21 better than the ten year in terms of -- and that's not
22 by way of criticism. I realize there are a lot of

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1 numbers here.

2 But I want to ask you whether it's not
3 accurate that the three networks, ABC, CBS and NBC,
4 between 1991 and 1995, that five year period, paid
5 ASCAP increases totalling 0.7%, namely going from a
6 total of \$31.52 million dollars in 1991 to \$31.75
7 million dollars in 1995.

8 Does that sound about right?

9 A I don't recall that. I don't recall the
10 agreements in -- what was the first year, '91?

11 Q Yes.

12 A That number strikes me as high, but I
13 don't recall without looking back at the agreements.

14 Q Haven't we established in your earlier
15 testimony that CBS paid \$9.75 million dollars in that
16 year pursuant to Judge Conner's ruling?

17 A I don't think so. I thought we were
18 talking about \$9.8 million dollars for a later year,
19 for '92 or '93, but I may be wrong.

20 Q In all events, that information would be
21 found in Judge Conner's opinion, wouldn't it, for that
22 year?

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1 A Probably. I'm not 100% sure. But if it's
2 during the relevant time period, yes. You know, it's
3 either in the decision or not; I just don't recall.

4 Q And during the same five year period, 1991
5 through 1995, is it not correct that the local
6 commercial television stations paid a five year
7 increase cumulating about ten percent going from net
8 fees to ASCAP in 1991 of \$68 million dollars to net
9 fees in 1995 of \$75 million dollars?

10 A Well, again, I don't recall for sure. I
11 think there was -- I think there was a \$10 million
12 dollar additional payment that probably came in in
13 1994, so that probably wouldn't be included in the end
14 points that you looked at.

15 There was a substantial increased payment
16 earlier on, but that may have been '84 or so when they
17 paid about \$44 million dollars extra for prior
18 periods. You may be about right for the end points.
19 I think there was a substantial payment in '94 that
20 wasn't allocated back to any of the prior years in any
21 way.

22 Q Comparatively, public broadcasting paid

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1 ASCAP a 15% increase over that same five year period,
2 correct, from \$2.6 million dollars in 1986 to \$2.99
3 million dollars in 1995?

4 A I'm sorry, these were which years again?

5 Q Pardon me, this is 1991 versus 1995, \$2.6
6 versus \$2.99.

7 A I believe that's right. I believe those
8 -- each of those deals were the same dollars for the
9 five year term of the agreements.

10 Q I want to finally ask you a few questions
11 about your alternative fee proposal, the trending
12 formula.

13 MR. SCHAEFFER: I don't think that was an
14 alternative fee proposal; I think that was just a
15 confirmation of his -- I think that's what he
16 testified to.

17 MR. RICH: Whatever it is, it's in the
18 direct testimony.

19 CHAIRPERSON GRIFFITH: The question,
20 please.

21 BY MR. RICH:

22 Q Dr. Boyle, your trending analysis takes as

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1 a starting point ASCAP's 1978 fee of \$1.25 million
2 dollars as awarded by the CRT and increases it by the
3 rate of growth in public broadcasting's private
4 revenues over that period.

5 Isn't that essentially right?

6 A It increases it by that, and it also takes
7 a look at changes in music use over that period as
8 well.

9 Q In music use?

10 A Both of those factors were included,
11 that's right.

12 Q For today's purposes, I just want to focus
13 on the first component since we haven't yet gotten our
14 hands around fully the music use data.

15 A That's fine.

16 Q Am I correct that, under this analysis,
17 the percent of private revenues that would be payable
18 by public broadcasting to ASCAP would remain constant
19 as between 1978 and the present? Is that the
20 mathematical effect of this?

21 A You lost me there.

22 As I recall, and I think it was in one of

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1 the exhibits you just gave us, maybe in the 1985
2 exhibit, --

3 Q Perhaps my question wasn't --

4 A Private revenue in total of '98 -- in '78,
5 excuse me, 1978 was about 31% of total public
6 broadcasting income and has risen to I think about
7 half by 1995.

8 Q I think you're answering a different
9 question than I intended to pose. Let me withdraw the
10 question and try again.

11 CHAIRPERSON GRIFFITH: Withdrawn.

12 BY MR. RICH:

13 Q Is the effect of your formula -- isn't the
14 effect to hold constant the percentage of private
15 revenues, whatever they are, earned by public
16 broadcasting which are paid -- which would be payable
17 to ASCAP in relation to what that percentage was in
18 1978; isn't that the mathematical effect of your
19 analysis?

20 A Again, maybe I'm just not understanding
21 the question; and if so, I apologize.

22 The formula takes the total private

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1 revenue reported in 1995 and compares it to private
2 revenue reported for 1978. To be more concrete, for
3 -- if you'd just let me find the numbers, it might
4 make it easier.

5 What we saw for 1995 for public
6 television, the private revenue was \$741.9 million
7 dollars looking back at the CPB report for the prior
8 year.

9 Excuse me a moment. I've lost the page.

10 The same figure was \$152.8 million dollars
11 in 1978. So as compared to the \$741.9 million as
12 compared to \$152.8 million reported for 1978, that was
13 the total amount of revenue from private sources
14 reported in that time, but it shows that kind of
15 growth from those figures.

16 Q If you were to, as a matter of math, take
17 the -- as the numerator -- 1.25 million dollars, the
18 fee awarded by the CRT in 1978, yes?

19 A Right.

20 Q And as the denominator, the private
21 revenues earned by public broadcasting in that year,
22 you would arrive at some percentage of private

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1 revenues that that fee represents, correct?

2 A Yes, you would.

3 I'm not sure -- I think you would probably
4 have to do it separately for radio and television.

5 Q Yes, I realize you broke it out.

6 A That would give you a percentage for --
7 essentially an effective rate for 1978, yes.

8 Q Yes.

9 Now is not the effect of the trending
10 formula to keep that rate constant over time in
11 relation to growth of private revenues?

12 A Hold on. You've got to bear with me here.

13 Are you saying that -- let's see. \$173.4
14 million dollars from paragraph 22 of my testimony.
15 You're saying that ratio would be the same as whatever
16 the fee is for 1995 divided by the private revenue in
17 1995 which used to be on the board, but I think I
18 erased, of a billion, 18 million?

19 Q Yes.

20 A What you're saying that the 1995 fee is
21 equal to the one million two fifty times the change in
22 revenue divided by base year, 173.4 million -- that's

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1 again -- the fact that you have to do this calculation
2 separately, that's right, saying the fact that the
3 revenue increased by about ten times.

4 The fee would go up in this same ratio,
5 yes.

6 Q So that is a premise that drives along
7 with your music ratio this approach, namely that the
8 -- in essence, what this approach does would be to
9 hold ASCAP at the same level of receipts on a percent
10 of private revenue basis in 1995 and for the term
11 covered by this proceeding as it earned as a result of
12 the CRT proceeding, correct?

13 That's what you just established.

14 A I suppose that's one way of looking at it.
15 Or the alternative is to say you take that fee and you
16 adjust it for the changes in economic circumstances,
17 in this case the changes of growth in private revenue
18 between the two years.

19 I think mathematically, at least, they
20 come out to an equivalent answer.

21 Q Yes, but the answer to my -- at least one
22 perspective and way of viewing it is that is correct,

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1 that that would be a mathematical effect; it would
2 keep that percent of private revenue constant over
3 time, correct?

4 A Yes, I believe it would.

5 Q Okay. Now let me ask you this question.

6 A Again -- excuse me.

7 Again, before any adjustment for the music
8 use.

9 Q Yes. And again, we're going to put that
10 aside for today, okay?

11 Let me ask you this. Have ASCAP's fees as
12 a percent of revenue remained constant between 1978
13 and the present in respect of commercial television
14 broadcasting?

15 A No.

16 Q In fact, in 1978, per the ASCAP document
17 I showed you, ASCAP represented that commercial
18 television was paying 28.3% of its revenues to ASCAP,
19 correct?

20 A That's right.

21 And of course, some of those fees were on
22 an interim basis and might have gotten adjusted later,

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1 but that's right.

2 Q And your testimony here asserts, using
3 your television industry revenue estimates, at today
4 commercial television is paying at a rate of .44%,
5 correct?

6 A Yes.

7 Q And I'll represent to you that if one used
8 the Kagan data, that the ratio would be .34%, okay?

9 A I haven't checked the math, but all right.

10 Q So there has been as much as, depending on
11 whose data you use, a 60% decline in the percentage of
12 revenue payments made by the commercial broadcasters
13 between 1978 and the present, correct?

14 A That's right.

15 Q On the radio side, you, I believe,
16 somewhere on this chart, indicate that today --

17 A 1.25%?

18 Q Yes, radio's paying 1.25%.

19 A That's right.

20 Q I'll represent to you that if the Kagan
21 estimate of radio -- commercial radio revenue for 1995
22 were substituted for yours, namely \$11.4 billion

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1 dollars, the ratio would be 0.96%.

2 And by comparison, I believe the same
3 submission before the CRT indicates roughly an
4 equivalent effective rate in 1978 as to radio, correct
5 -- 1.2% I believe it is so represented in the ASCAP
6 papers in the CRT proceeding.

7 Do you recall that?

8 A No, I don't. Which one is that?

9 MR. SCHAEFFER: I didn't recall -- the
10 first time I saw the document was this afternoon, and
11 I don't recall them talking about an effective rate as
12 much as the license fee calculation, which is an
13 entirely different thing because that involves
14 deductions and other matters.

15 But what is the incident number?

16 CHAIRPERSON GRIFFITH: Can you point out
17 to us what you're referring to, Mr. Rich, please?

18 MR. RICH: Yes.

19 BY MR. RICH:

20 Q If you'd look at page ten, please.

21 A Of which document?

22 Q Of 27X, ASCAP's prehearing statement.

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1 A Yes.

2 Q Turn to page ten.

3 Do you see a reference to radio's
4 percentage of 1.21% -- reference to commercial radio
5 there?

6 A I do.

7 Could you let me look back at the prior
8 page for a moment?

9 Q Sure.

10 A Yes, that's right. That's the effective
11 rate reported there is 1.21%.

12 Q Yes. So if one adopted your data for
13 radio -- ASCAP's data for radio, there would be
14 roughly a constant percent of commercial radio
15 revenues paid over time to ASCAP, correct?

16 A The current rate -- the effective rate as
17 of 1995 would have been slightly higher.

18 Q Versus a decline on the television side of
19 as much as 60% of its effective percent of revenue
20 payments, correct?

21 A Yes.

22 Q Okay. Now when you --

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1 A Again, I haven't check the TV math, but
2 yes.

3 Q When you did your trending formula, you
4 did not take account of this steep decline in the
5 affected percentage of revenues paid by the commercial
6 broadcasters between 1978 and the present, correct?

7 A That's right.

8 Q And had you done so, do you know what the
9 impact on your model would have been?

10 A No, no; I simply adjusted the fees set in
11 1978 for changes in revenue for public television and
12 public radio separately.

13 Q Now if you look back at this ASCAP
14 submission from 1978 at page 49, please.

15 A The ASCAP submission -- that's Exhibit 27
16 again?

17 Q Yes.

18 A Page 49?

19 Q Yes, in the second paragraph from the
20 bottom.

21 Do you see a reference to a Touche Ross
22 survey showing 89% of all public television

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1 performances to be of ASCAP music?

2 A Yes, I do.

3 Q Do you believe ASCAP maintains that share
4 of the public television music use today?

5 A I'm not sure that was an accurate figure
6 at that time. I don't think our current share is that
7 high. But that time, conversations I recall were that
8 that survey had lots of problems with it, and I'm not
9 sure that percentage is at all accurate or reliable.

10 Q You, in fact, have not presented any
11 comparative music share data to this Panel in this
12 proceeding, is that correct -- you meaning ASCAP?

13 A That's right, we've focused on the use of
14 ASCAP music and its changes over time and the revenue
15 for the public broadcasters.

16 MR. RICH: If I may have one moment,
17 please.

18 Your Honors, I have no further questions
19 at this point with the obvious understanding that I
20 will resume on music data at the appropriate time.

21 CHAIRPERSON GRIFFITH: Yes, understand.

22 MR. SCHAEFFER: We'd like to take a short

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1 -- can we take a break until 6:10 or 6:15 and consult
2 with our client, then we'll come back?

3 CHAIRPERSON GRIFFITH: How about 6:08?

4 MR. SCHAEFFER: How about 6:12?

5 CHAIRPERSON GRIFFITH: 6:10.

6 (Whereupon, the foregoing matter went off
7 the record at 5:50 p.m. and went back on
8 the record at 6:10 p.m.)

9 CHAIRPERSON GRIFFITH: All right, let the
10 record reflect please that this is a continuation of
11 the NCBRA marathon.

12 (Laughter.)

13 MR. KLEINBERG: Triathlon, I could say.

14 CHAIRPERSON GRIFFITH: Mr. Shore, are you
15 ready, sir?

16 MR. SHORE: Just a few questions.

17 CHAIRPERSON GRIFFITH: All right, please.

18 REDIRECT EXAMINATION (continued)

19 BY MR. SHORE:

20 Q Dr. Boyle, Mr. Rich asked you various
21 questions about the Rate Court and the positions that
22 ASCAP has taken there. He made it sound like ASCAP

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1 never reaches agreement with its customers.

2 Is that the case?

3 A No, it certainly is not.

4 We've reached repeated agreements with the
5 radio industry, the last one about two years ago. At
6 roughly five year intervals before that, we've reached
7 agreements with the television networks subsequent to
8 the Rate Court decision.

9 At least four, I believe, that I can think
10 of, we still have ongoing negotiations. And there's
11 lots of other customers with whom we've reached
12 agreement. In fact, it's only the four or five rate
13 cases we've had in the whole 75 or 80 years of our
14 history.

15 Q Okay, next Mr. Rich asked you various
16 questions about Public Broadcaster's Exhibit 23X. And
17 I'd ask you to turn to -- and I believe it's page 12.
18 I counted it once. There don't appear to be pages.

19 A I'm sorry, which one is 23X?

20 Q It's the transcript of a hearing in the
21 1987 Public Broadcasting Rate Adjustment Proceeding.

22 A Okay.

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1 Q I think it's page 12. Let me count again.
2 Page 11, excuse me.

3 MR. SCHAEFFER: They're not numbered. You
4 just have to count.

5 BY MR. SHORE:

6 Q I believe Mr. Rich's questions went to
7 whether you're aware of whether Mr. Koenigsberg had
8 represented that he was happy that a settlement had
9 been reached. In performing your analysis, were you
10 aware that he said the following:

11 "Finally, Mr. Chairman, I would add that
12 there is one aspect of these two joints proposals that
13 is of the utmost performance. It is of the utmost
14 importance that the Tribunal note that, in both
15 instances, ASCAP and the associations involved, all
16 the parties involved have made their proposals on non-
17 prejudicial and non-precedential basis;

18 "And that the compulsory license fees of
19 the ASCAP repertoire that we have agreed upon and
20 recommended in the words of the proposal, and I will
21 quote from it, 'do not reflect any assessment by any
22 party of the absolute or relative value of the right

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1 of performance of music in the ASCAP repertoire to the
2 stations involved.'

3 "Now in both the 1978 and 1982 rate
4 adjustment proceedings, the Tribunal recognized this
5 fact because it was the" -- and then it's cut off --
6 "in those proceedings recognized it expressly and
7 stated it expressly in its final determination.

8 "And all the parties to these joint
9 proposals -- ASCAP, ACE, NFCP and NRB -- requested the
10 Tribunal do so again in its decision this year.
11 Indeed, I think it is fair to say that such a
12 disclaimer is an essential element which allowed us to
13 reach a voluntary agreement.

14 "It encouraged us to reach a voluntary
15 agreement; it was one of the conditions for us
16 reaching the agreement. And reaching agreement, of
17 course, of a goal (sic) which has been encouraged both
18 by the statute and by the Tribunal."

19 Were you aware that Mr. Koenigsberg had
20 made such a statement at that proceeding?

21 A I was aware of the general substance. I
22 wasn't aware of his statement at this proceeding

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1 before seeing it today.

2 Q Finally, there was some discussion of the
3 various Rate Court proceedings -- and I think you just
4 talk about it -- and the changes in the effective
5 rates that have been paid over time and the changes in
6 the amounts that have been paid over time between
7 public broadcasters and the commercial industry.

8 In light of those discussions, would you
9 change anything about your methodology in first the
10 license fee calculation that is done on the
11 chalkboard?

12 A No, I wouldn't.

13 This was designed essentially to take a
14 snapshot at the current period of time to start
15 afresh, if you will, and it reflects the economic
16 situation in both local TV and network TV and in the
17 radio industry as of 1995, the latest year for which
18 the data were available.

19 And if we're going to use that as a bench
20 mark, it's appropriate to use that rate. To the
21 extent that it's declined over time, it just means
22 that this is the rate then in effect that we'd be

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1 applying to commercial -- to the public broadcasters.

2 I suppose it means had you done similar
3 analysis at earlier years, this effective rate would
4 have been higher and the proposed fees would have been
5 relatively higher; but that was -- that's essentially
6 done with. That period was closed out.

7 This just says at that point in time those
8 -- that's the best summary measure of the facts. And
9 that's what we're proposing going forward.

10 Q Okay, and with respect to the change in
11 effective rate over time on the radio -- or on the
12 calculation of the trending for the 1978 CRT decision,
13 did any of the discussions that you had on cross
14 examination change your methodology or the results
15 that you've reported in your testimony?

16 A No, I don't think so. It was just
17 designed -- that was designed to adjust the fees that
18 the Tribunal determined for changes in the economic
19 circumstances for public broadcasting at that time.

20 And revenue growth, I think, is the best
21 measure of those changes.

22 MR. SHORE: Nothing further.

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1 CHAIRPERSON GRIFFITH: All right.

2 Mr. Kleinberg.

3 MR. KLEINBERG: I actually have two
4 questions.

5 CHAIRPERSON GRIFFITH: All right, sir.

6 CROSS EXAMINATION

7 BY MR. KLEINBERG:

8 Q If I might, Mr. Boyle, I know it's been a
9 -- Dr. Boyle, it's been a long day.

10 Mr. Rich asked you some questions about
11 some ASCAP Rate Court cases -- the Showtime case, I
12 believe, and the Buffalo Broadcasting case. Do you
13 remember that earlier this afternoon?

14 A Yes.

15 Q And he was pointing out what ASCAP's
16 position was in both of those cases, but he didn't
17 point out what the broadcasters or the music users'
18 positions were in those cases.

19 And I wanted just to have you tell me --
20 in the Showtime case, is it not correct that the music
21 user, the person equivalent to public broadcasting,
22 was trying not to look at the prior deal that ASCAP

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1 had with HBO?

2 A That's right; they wanted to look, as I
3 recall, at the prior deal BMI and Showtime had
4 negotiated, not the ASCAP/HBO or the ASCAP/Disney
5 negotiations.

6 Q In the Buffalo case, which was the local
7 television broadcasters ably represented by Mr. Rich,
8 as was Showtime, those broadcasters were trying to
9 disavow the Shenandoah prior license agreement between
10 the local television industry and ASCAP, correct?

11 A As I recall the broadcasters's position in
12 the local television proceeding, they looked at the
13 network agreements as a bench mark and made an
14 adjustment to those network agreements. It was --
15 they totally ignored the prior negotiating history
16 between ASCAP and the local television industry.

17 Q And they were, in fact, seeking large
18 decreases in the rates and absolutely dollars that
19 would have been paid under those prior agreements that
20 had been voluntarily entered into between the local
21 television industry and ASCAP, is that correct?

22 A That's right.

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1 I don't remember the precise level of
2 their quote, but I think it was something in the mid
3 \$40 million dollar range, something like that.

4 Q And I take it, in the end, the court did
5 what the court deemed to be the appropriate result,
6 which didn't necessarily follow anything that any of
7 the parties had articulated as their propositions; is
8 that also correct?

9 A Yes.

10 MR. KLEINBERG: No further questions.

11 CHAIRPERSON GRIFFITH: All right, any
12 further questions?

13 MR. RICH: Just one or two.

14 RECROSS EXAMINATION

15 BY MR. RICH:

16 Q Is it not the case, Dr. Boyle, that in the
17 cases which Mr. Kleinberg just cited to you, each of
18 the judges indicated that indeed the appropriate
19 starting point for analysis are prior arms length
20 negotiated agreements between the parties unless it
21 can be shown that there are change circumstances
22 warranting deviation from it?

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1 A Magistrate Judge Dolinger certainly did in
2 the Showtime proceeding because he fell back on the
3 1972 license agreement. Judge Conner did in the
4 network --

5 Q Showtime or Buffalo Broadcasting?

6 A I'm sorry, Buffalo Broadcasting.

7 Judge Conner certainly did in the network
8 case. I don't think that that was necessarily the
9 case in the Showtime proceeding, but I don't remember
10 for sure.

11 Q Because there was no history of developed
12 license experience, is that correct, between the
13 parties themselves?

14 A I believe that's right, but I'd have to go
15 back. I haven't reviewed this decision in a while.
16 I think that's right.

17 MR. RICH: No further questions.

18 CHAIRPERSON GRIFFITH: All right.

19 MR. SHORE: One more.

20 REDIRECT EXAMINATION

21 BY MR. SHORE:

22 Q In those two cases, was either -- were any

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1 of the agreements that were discussed and whether
2 those agreements would be precedential, did any of
3 those agreements have the no precedent provision in
4 them, to your knowledge?

5 A The local television agreement certainly
6 did not. The network television agreements did not.
7 I'm not so sure about the cable agreements. That was
8 early on in our cable history. They may or may not
9 have. I just don't recall.

10 Q Why would it -- being early in the history
11 have anything to do with whether or not it had a no
12 precedent provision?

13 A I don't recall the terms of those
14 agreements. I know in local and network TV there was
15 not such language. There may have been in the cable
16 agreements. I just don't recall for sure.

17 MR. SHORE: Okay, nothing else.

18 CHAIRPERSON GRIFFITH: All right.

19 JUDGE DREYFUS: I have one question.

20 The commercial television has what
21 percentage of audience as market share?

22 THE WITNESS: This is all of broadcast

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1 television.

2 JUDGE DREYFUS: Is it in the 60% range?

3 THE WITNESS: It's probably not. It's
4 probably under 60% now. May well be under 50% when
5 you include all the cable households these days. It's
6 certainly been falling fairly steadily over the last
7 several years.

8 I don't think it's as high as 60 anymore.
9 It may not even be as high as 50 now.

10 JUDGE DREYFUS: And public television?

11 THE WITNESS: I want to say something like
12 three or four percent, but it's been a while since I
13 looked at the Nielsen figures. I think that's in the
14 range.

15 JUDGE DREYFUS: This is off the top of
16 your head, I know, but the question then is, did you
17 take that into account in any of these calculations?

18 THE WITNESS: Our experience in the past
19 in the negotiations is the best way to take that into
20 account is that number right there, the revenue of the
21 various industries received because that's typically
22 driven in large measure by the audience they're

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1 reaching, whether it's selling advertising to reach
2 audience or whether it's private donations and other
3 contributions to have access to that type of
4 programming.

5 So the revenue, in my experience, has
6 certainly been the single best measure of all that.
7 In fact, that's one of the things Judge Conner said in
8 the network case is that encapsulates all of these
9 different economic situations -- competition from
10 cable, competition from other sources.

11 All of those things should ultimately
12 affect revenue figures.

13 JUDGE DREYFUS: Okay, thank you.

14 CHAIRPERSON GRIFFITH: All right.

15 May Dr. Boyle be excused?

16 Dr. Boyle, you may be excused, sir. Thank
17 you very, very much.

18 THE WITNESS: Thank you.

19 CHAIRPERSON GRIFFITH: You're free to go.

20 (The witness was excused.)

21 Ladies and gentleman, just so we're clear
22 now, we -- the proceeding will adjourn until Monday,

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1 March 30, 1998 at 10:00 a.m.

2 MR. SCHAEFFER: And just for the record,
3 we are not going to close yet because we're still
4 working out the famous document issue which we hope to
5 work out on Monday now, I understand.

6 CHAIRPERSON GRIFFITH: Well, my next
7 comment was going to be at which time, Public
8 Broadcasters will begin the presentation of their
9 direct testimony.

10 MR. RICH: That's correct.

11 We will be beginning with Mr. Downey and,
12 time permitting, will proceed with Mr. Jablow.

13 CHAIRPERSON GRIFFITH: Fine.

14 MR. SCHAEFFER: And what's the next order
15 after those two?

16 MR. RICH: Jameson and Jaffe.

17 CHAIRPERSON GRIFFITH: All right.

18 Thank you very, very much. And we will
19 see you on March 30. Thank you.

20 (Whereupon, the proceedings were adjourned
21 at 6:22 p.m., to be reconvened at 10:00 a.m., Monday,
22 March 30, 1998.)

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This is to certify that the foregoing transcript in
the matter of: Hearing: Adjustment of the Rates for
 Noncommercial Educational
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 Docket No. 96-6 CARP NCBRA

Before: Library of Congress
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Date: March 19, 1998

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
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A handwritten signature in dark ink, written over a horizontal line. The signature is stylized and appears to be "K. H. [unclear]".